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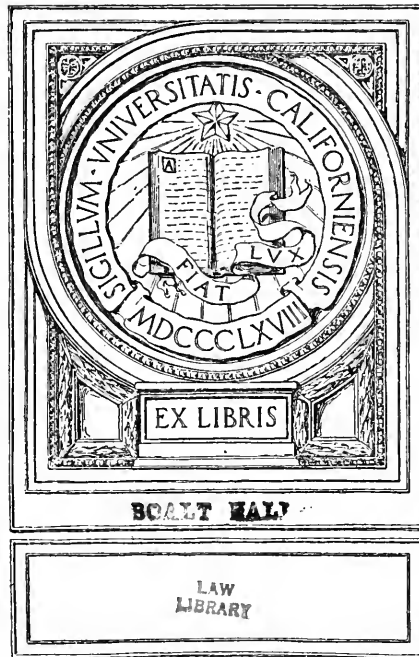
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Zouche

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Iuris Inter Gentes, et Quaestionum
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THE
CLASSICS OF INTERNATIONAL LAW

EDITED BY

JAMES BROWN SCOTT

Member of the Institute of International Law

UNIV. OF
CALIFORNIA

Iuris et Iudicii Feialis, sive, Iuris Inter Gentes, et
Quaestionum de Eodem Explicatio

BY RICHARD ZOUCHE

EDITED BY THOMAS ERSKINE HOLLAND

VOL. I. A Reproduction of the First Edition (1650), with Introduction, List of Errata, and Table of Authors.

VOL. II. A Translation of the Text, by J. L. Brierly.

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PREFACE.

The Carnegie Institution of Washington has undertaken the republication of the leading classics of International Law and the present volume, edited by the distinguished publicist Professor Thomas Erskine Holland, is the first of a comprehensive series.

One reason for the undertaking is the difficulty of procuring the texts in convenient form for scientific study; the libraries in the United States have been searched with the result that few of the earlier works were to be found. Another reason is that some of the works selected for republication have never been translated into English. The American publicist is therefore at a disadvantage in consulting works of admitted authority, and when found they are, as it were, sealed books to all but trained Latinists. The specialist is thus forced to rely upon summary statements and references to them to be found in treatises on International Law, or is driven to examine them in European Libraries, often a difficult task, while the general reader is practically barred from the stores of knowledge locked up in the earlier works on the Law of Nations. The same difficulty exists in Latin America, Japan, and in a lesser degree in many European countries.

Eminent publicists, European and American, who have been consulted as to the usefulness of the plan to republish the Classics, have indorsed the project and have pledged their personal co-operation. The works to be included in the series have not only been approved but suggested by them, so that the undertaking is international in scope, in selection, and in execution.

The underlying principle of selection has been to reissue those works which can be said to have contributed either to the origin or to the growth of International Law and the term classic has been used in the broad rather than in the narrow sense, so that no work will be omitted which can be said to have contributed to

the origin or growth of the Law of Nations. The masterpieces of Grotius will naturally be the central point in the series, but the works of his leading predecessors and successors will likewise be included. The text of each author will be reproduced photographically, so as to lay the source before the reader without the mistakes which might creep into a newly printed text. In the case of the early authors the photographed text will be accompanied by a revised text whenever that course shall seem desirable. An Introduction will be prefixed to each work, giving the necessary biographical details and stating the importance of the text and its place in International Law; tables of errata will be added, and notes deemed necessary to clear up doubts and ambiguities or to correct mistakes in the text will be supplied. Variations in successive editions of the text published in the author's lifetime will be noted, but little or nothing in the nature of historical commentary will be furnished.

Each work will be accompanied by an English version made expressly for the series by a competent translator.

It is hoped that the series will enable general readers as well as specialists to trace International Law from its faint and unconscious beginnings to its present ample proportions and to forecast with some degree of certainty its future development into that law which Mirabeau tells us will one day rule the world.

JAMES BROWN SCOTT,
General Editor.

Washington, D. C., August 12, 1911.



Iuris et Iudicii, Pactis, Sive, Iuris Inter Gentes, et Quæstionum de Fidei Explicatione

Qua Quæ ad Pacem & Fidem inter gentes, Præfatus
aut Populos spectant, et Quæstiones de Fidei
Explicatione, et Quæstiones de Fidei

Præfatus de Fidei

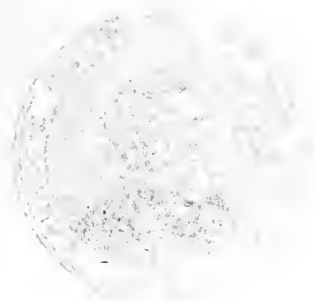
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THOMAS PRÆFATUS

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Glacete, Præfatus de Fidei

Et Præfatus de Fidei



Præfatus de Fidei



Iuris et Iudicii Fecialis, Sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio

Qua Quae ad Pacem & Bellum inter diversos Principes,
aut Populos spectant, ex praecipuis Historico-
jure-peritis, exhibentur.

BY

RICHARD ZOUCHE, D. C. L.

*Regius Professor of Civil Law in the University of Oxford
and Sometime Judge of the Admiralty*

EDITED BY

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VOLUME ONE



CARNEGIE INSTITUTION OF WASHINGTON

1911

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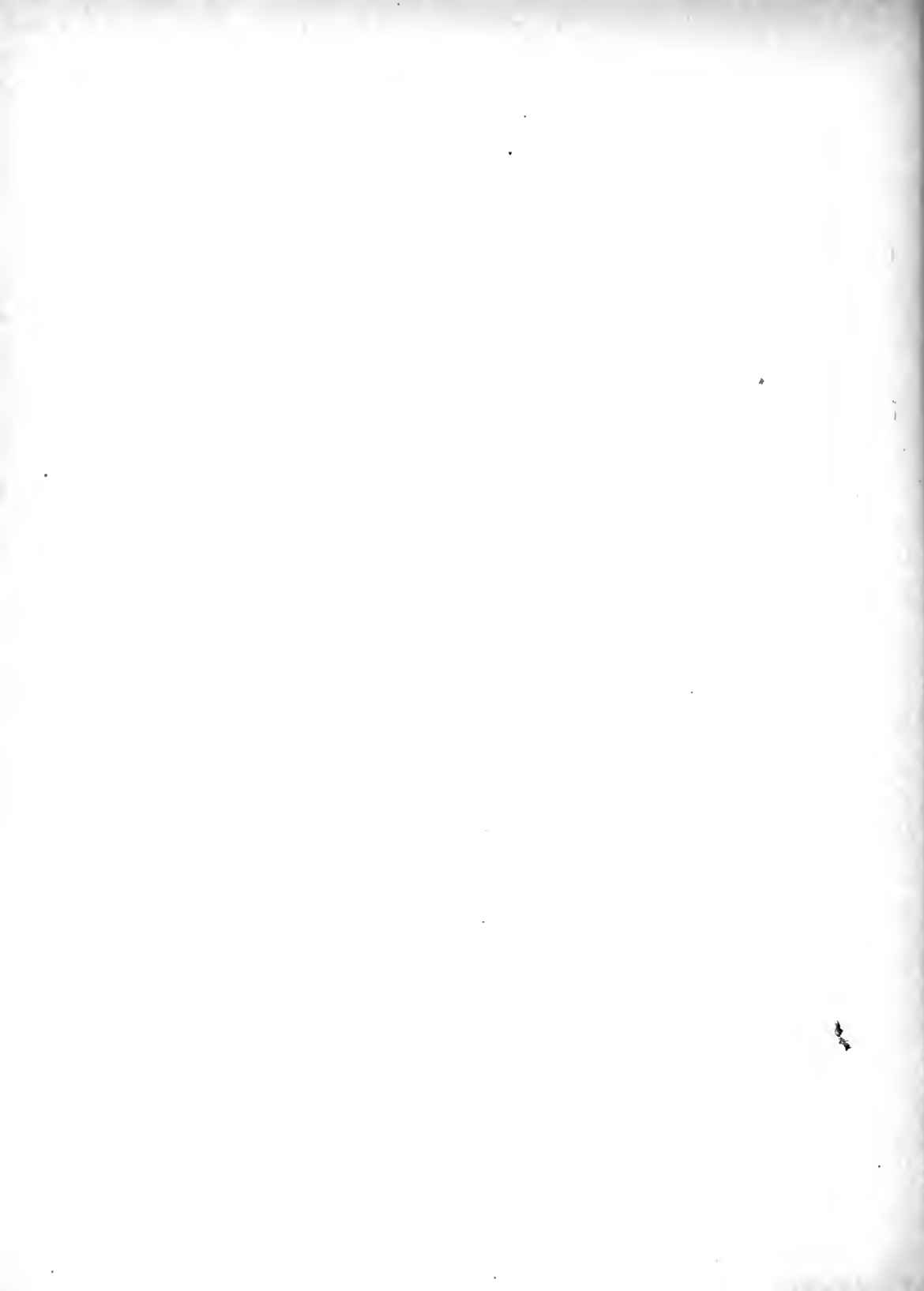
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The text here reproduced is from a copy of the original edition of 1650 in the possession of Thomas Erskine Holland: " " "

The portrait of Zouche which forms the frontispiece is from a painting by Cornelius Jansen, in the possession of Rev. Edward R. Zouche Walker, a descendant of the illustrious Richard Zouche (see Introduction, page v).



INTRODUCTION.

I.

A BIOGRAPHY OF THE AUTHOR.*

Richard Zouche was born in 1589 at Anstey in Wiltshire. His father, Francis Zouche, Lord of the Manor there, and at one time Member of Parliament, was son of Sir John, who was a younger son of John, Eighth Lord Zouche of Haryngworth, whose family claimed descent from the Dukes of Brittany. His mother was, perhaps, Phillipa, daughter of George Ludlow, of Hill Deverell, Wilts.

Richard was elected Scholar of Winchester in 1601, Scholar of New College, Oxford, in 1607, and Fellow in 1609. He took the degree of B. C. L. in 1614, and that of D. C. L. in 1619; having been already, on January 30th, 1618, admitted to be an Advocate of the College of Doctors Commons, hard by St. Paul's Cathedral, the members of which, who must all have graduated in Civil Law at Oxford or Cambridge, enjoyed, down to the year 1858, the right of exclusive audience in the Ecclesiastical Courts and the Court of Admiralty.†

Zouche does not, however, seem to have laid himself out for practice in London till a later period of his career. In 1620 he received the appointment of Regius Professor of Civil Law at Oxford, in succession to John Budden, who had followed in that office, after acting as his deputy, the famous Italian refugee, Alberico Gentili.

* Much of the information here put together was derived from special researches made by the present writer in the Record Office and in the Registers of the Court of Admiralty and the Diocese of Oxford, as well as in County and Parochial Histories, and the various writings of Anthony Wood.

† For an interesting account of the College of Advocates, see "*Pages de l'histoire du Droit en Angleterre, &c.*," par E. Nys, Bruxelles, 1910.

In 1622 Zouche married Sarah, daughter of John Hart, of the family of that name settled at Brill in Oxfordshire, a Proctor in Doctors Commons; * and having thus vacated his New College Fellowship, entered himself in the following year as a Gentleman Commoner at Wadham College, but in 1625 was appointed Principal of St. Alban Hall, which has no longer an independent existence, having been in 1882 annexed to the neighbouring Merton College. Through the influence of his cousin Edward, the eleventh and last Lord Zouche of the older creation and Lord Warden of the Cinque Ports, he had been in 1621 and 1624 elected M. P. for Hythe.

It is not easy to understand how Zouche, especially in those days of difficult locomotion, managed to combine his work at Oxford with such success in his profession, hastened doubtless by the business which his father-in-law was able to put in his way, as procured his promotion, in 1641, on the death of Sir Henry Marten, to the Judgeship of the Admiralty, a post which he contrived to hold till deprived of it, for political reasons, in 1649: certain, however, it is that he was also for many years a prominent figure at Oxford. He took a leading part in the Laudian codification of the Statutes of the University (1629-1633), though we hear of his being frequently called away from it, "the London Term having begun," by his employment at Doctors Commons. In 1632 he became Chancellor of the Diocese, and from about 1649 held the office of "Assessor," practically Judge Ordinary, of the privileged Court of the Chancellor of the University.† In 1658 he was an unsuccessful candidate for the Keepership of the University Archives. He must also have, all the while, discharged dili-

*A fine monument is still preserved in Fulham Church to Catharine, wife of this John Hart, with figures of her numerous children, among whom are doubtless Sarah, the wife of R. Zouche, and Richard, who became D. C. L. and an advocate of Doctors Commons.

† This court, created by Charter of Henry III, confirmed by the Act of Elizabeth, still exercises unlimited civil jurisdiction in all causes of action, not relating to freehold, in which members of the University are concerned. It administered, down to the year 1851, the Civil Law, since then, the Common Law of England. The Office of "Assessor," placed upon a permanent footing by the Statutes of 1636, has been held by the present writer since 1876. Zouche before succeeding Dr. Sweet in the tenure of it, had occasionally served as one of the "Judices Selecti" by whom its duties had been previously performed.

gently, though often by deputy, the duties of his Professorship; as will appear from the list of his writings, many of which were obviously, and several expressly, composed for the guidance of his pupils.

In the civil troubles, Zouche's sympathies were on the side of the King, and his departure from London for Oxford in 1643, without paying a Parliamentary subsidy, was followed by a distress levied on the furniture of his chambers in Doctors Commons. In 1646, he was one of the negotiators, on behalf of the Royalist forces in Oxford, of the articles for the surrender of the City to Fairfax; under which he, and the other "malignants" there, were permitted, within six months, without taking the covenant, to compound for their estates, and to proceed to London for the purpose. He compounded, accordingly, for interests in land at Harefield near Uxbridge, at Ascott in Oxfordshire, and at Doctors Commons in the City of London, at one-tenth of their value. In 1647, we find him engaged, together with Dr. Robert Sanderson, in drafting the "Reasons" of the University of Oxford for disagreeing with the Solemn League and Covenant and the Negative Oath; he supplying "the law part," while Sanderson added "what referred to reason and conscience." He seems, however, to have afterwards repudiated his share in this business, and in the following year had so far submitted to the Parliamentary Visitors of the University as to be allowed to retain his Academical preferments, which he continued to do as long as he lived. The visitors were also induced to restore his son Richard to a Demyship at Magdalen College, of which he had been deprived.

Zouche's position during the remainder of the commonwealth time continued to be ambiguous. In 1649, the judgeship of the Admiralty was taken from him and conferred upon Dr. Exon. On the other hand, he was, in 1654, placed upon a special commission of *oyer and terminer*, consisting of three Common Law Judges, three Doctors of Civil Law, and three laymen, for the trial of Don Pantaleone Sa, the brother of the Portuguese Ambassador, for a murder committed in the course of a brawl at the Exchange. Sa was condemned and executed, and one of the

II.

ZOUCHE'S WRITINGS.

The literary output of Zouche, especially if we remember his life-long occupations as Professor, Advocate and Judge, was as surprising in amount as it was varied in character. His first and somewhat juvenile, publication (No. 1 in the list which follows) was a poem descriptive of Europe, Asia and Africa, after the manner of the "Periegesis" of Dionysius. In a euphuistic preface the author apologises for his poetical venture, having known "some whose credit hath challenged respect, exceeding strong in prejudice against the composing and reading such trifles." In maturer years Zouche attempted a play (No. 6), if it be rightly attributed to him, "intended to be performed before an Academical audience," fitted, indeed, for no other, since the *dramatis personae* are such bloodless abstractions as "Fallacy," "Opposition," and "Ambiguity." At a much later date, he produced a little book of logical, rhetorical, and ethical maxims (No. 14). Most of his writings were, however, upon the study and the practice of the Civil Law. Several of these were hand-books for disputations at the University (Nos. 12, 15), and two were of a polemical cast, dealing, respectively, with the case of *Sa*, already mentioned, and with Sir Edward Coke's views upon Admiralty Jurisdiction (Nos. 13, 16). But his most important achievement was the mapping out of the whole field of law, and the subsequent examination in detail of its various departments. The "*Elementa Jurisprudentiae*" (No. 2), although in terminology wholly, and in substance mainly, a setting forth of Roman Law, is intended to supply a generally applicable scheme of legal science, distributed under the two main heads of "*Jus*" and "*Judicium*" (or "*Rights*" and "*Remedies*"). In accordance with the method which he had thus prescribed to himself, Zouche

afterwards dealt, in a series of monographs, with the several topics of "Feudal," "Sacred," "Maritime" and "Fecial" Law (Nos. 3, 4, 5, 7, 8, 9, 10). His was essentially a logical mind, and the scheme which he had proposed to himself was consistently carried out, except, perhaps, in the last-mentioned work, of which a more particular account will be given hereafter.

The following is a full list of the works written by or attributed to Zouche:

1. "The Dove," or passages of cosmography, London, 1613, 12mo, dedicated to Edward, Lord Zouche, "by his kinsman, the author"; reprinted, with a memoir and notes, by his descendant, the Rev. Richard Walker, B. D. Oxford, 1839, 8vo.
2. "Elementa Jurisprudentiae, definitionibus, regulis, et sententiis selectionibus juris civilis illustrata," Oxford, 1629, 12mo; Oxford, 1636, sm. 4to, together with Nos. 4 and 5; Leyden and Amsterdam, 1652, 12mo, together with Nos. 7, 8, 9; Leyden, 1653, 12mo, together with Nos. 4, 5; and 1681.
3. "Descriptio juris et judicii feudalis, secundum consuetudines Mediolani et Normanniae, pro introductione ad studium jurisprudentiae Anglicanae," Oxford, 1634, 12mo.
4. "Descriptio Juris et Judicii temporalis, secundum consuetudines feudales et Normannicas," Oxford, 1636, 4to, together with Nos. 2 and 5; reprinted in the 1683 edition of R. Mocket's "Tractatus de politeia ecclesiae Anglicanae."
5. "Descriptio Juris et Judicii ecclesiastici, secundum canones et constitutiones Anglicanas," Oxford, 1636, 4to, together with Nos. 2 and 4; also reprinted in the 1683 edition of Mocket's work.
6. "The Sophister, a Comedy," London, 1639, 4to, anon., but ascribed by an old MS. note in the Bodleian copy to Zouche: so also by most authorities on the drama, though not by G. Langbaine.
7. "Descriptio Juris et Judicii sacri, ad quam leges quae religionem et piam causam respiciunt referuntur," Oxford, 1640, 4to, together with Nos. 2, 8 and 9; Leyden and Amsterdam, 1652, 12mo.
8. "Descriptio Juris et Judicii militaris, ad quam leges quae rem militarem et ordinem personarum respiciunt referuntur," Oxford, 1640, 4to, with Nos. 2, 7 and 9; Leyden and Amsterdam, 1652, 12mo (Part II of this work treats "De jure militiae civilis, sive de jure Nobilitatis").

9. "Descriptio Juris et Judicii maritimi, ad quam quae navigationem et negotiationem maritimam respiciunt referuntur." Oxford, 1640, 4to, with Nos. 2, 7 and 8; Leyden and Amsterdam, 1652, 12mo (Part I treats "De Jure et Judicio maritimo," Part II "de Jure et Judicio negotiationis maritimae").
 10. "Juris et Judicii fecialis, sive Juris inter Gentes, et quaestionum de eodem explicatio," Oxford, 1650, 4to; Leyden, 1651, 12mo; Hague, 1659, 12mo; Mayence, 1661, 12mo; translated by Alfred Vogel as "Allgemeines Völkerrecht, wie auch allgemeines Urtheil und Ansprüche aller Völker," Frankfurt, 1666, 12mo.
 11. "Cases and Questions resolved in the Civil Law," Oxford, 1652, 12mo, intended later "to be published in the proper language of the Civil Law, for the use of students in their profession." Part I relates to Rights, Part II to Procedure.
 12. "Specimen Quaestionum Juris Civilis," Oxford, 1653, anon., but certainly by Zouche, see No. 15.
 13. "Solutio Quaestionis veteris et novae, sive de Legati delinquentis judice competente dissertatio," Oxford, 1657, 12mo; Cologne, 1662, 12mo; Berlin, "cum notis Henelii," 1669, 12mo; translated by J. J. Lehmann as "eines vornehmen englischen Jureconsulti Gedanken von dem Traktement eines Ministers," etc. Jena, 1717, 8vo; also by D. J. gent, as "a Dissertation concerning the punishment of Ambassadors," &c., "with the addition of a Preface concerning the occasion of writing this Treatise," London, 1717, 8vo: (published with reference to the affair of the Swedish Ambassador, Gyllenburg).
- The title of this book was probably suggested by that of an anonymous treatise published in 1606 at Strassburg, "Quaestio vetus et nova: an legatum adversus principem vel rempublicam, ad quam missus est, delinquentem salvo jure gentium capere, retinere, ac punire liceat." *
14. "Eruditionis ingenuae specimen, scilicet artium Logicae, Dialecticae, et Rhetoricae, nec non moralis Philosophiae, M. T. Ciceronis definitionibus et sententiis illustratae," Oxford, 1657, 12mo, anon., but dated from St. Alban Hall, and attributed to Zouche by an old MS. note in the Bodleian copy.
 15. "Quaestionum Juris Civilis Centuria, in decem classes distributa," Oxford, 1660, 12mo; London, 1682, 12mo. In the Preface, dated 1659, Zouche alludes to his publication of the "Specimen" (No. 12) six years previously, and dedicates these "senectutis

* This work is mentioned in chapter 12 of Zouche's book.

15. —continued.

molimina " to the " Jurisprudentiae studiosis, praesertim B. Wicchami alumnis," having himself been " humanioribus literis et juris studio institutus " in the two Wiccamical Colleges. In a case in the Prerogative Court, in 1773, *Wright v. Sarmuda*, Classis iii, Quaestio 6, of this collection having been cited in argument, the Judge, Sir W. Wynne, said " that work was not designed as an authority for courts, but as a disquisition for the schools." (See the long note to *Taylor v. Diplock* in 2 Phill. Eccl. Reports, 273; also 2 Salk. by Evans, 593.)

16. " The Jurisdiction of the Admiralty of England, asserted against Sir Edward Coke's *Articuli Admiralitatis*, in chap. xxii of his ' Jurisdiction of Courts,' " London, 1663, 8vo. In a preface, dated from Doctors Commons, Dr. Baldwyn attests that this treatise was delivered into his hands by the author himself to be printed. It was reprinted in the folio edition of 1686, of the " *Consuetudo vel Lex Mercatoria*," of Gerard Malynes.

With a view to his candidature for the Keepership of the Archives, Zouche compiled in manuscript " Privileges of the University of Oxford, collected into a body." A transcript of this manuscript is preserved at St. John's College.

III.

THE WORK NOW REPRODUCED.

It has been already explained that the "Jus Feciale," published in 1650, was one, and the last, of a series of seven monographs in which Zouche dealt with various departments of law, in accordance with a plan which he had prescribed to himself, and had explained, twenty-one years previously, in his "*Elementa Jurisprudentiae, definitionibus, regulis, et sententiis selectioribus Juris Civilis illustrata*." In order to appreciate the later, it is therefore necessary to have some acquaintance with the earlier work, of which the learned Bishop Sanderson said to a friend that the "*Elementa Jurisprudentiae* was a book he could say without book; and that no wise man could read it too often, or love or commend it too much." In it Zouche maps out the whole field of Law according to a system of his own.

In Part I he treats, first, of the "Object" of Jurisprudence (*Jurisprudentiae Finis*), which is the enforcement of "Justice," the principles of which are derived from *Jus Naturale*, *Jus Gentium*, and *Jus Civile*; secondly, of the "Subject" of Jurisprudence (*subjectum in quo versatur*), i. e. "Human Intercourse" (*communio humana universa*), which takes place between: (1) private individuals, (2) Sovereign and subject, (3) persons in special relations, ecclesiastical, military and nautical, (4) Sovereign and Sovereign (*communio generalis inter diversos Principes et Respublicas*), each of these four topics involving the consideration of *personae*, *res*, *actus* (here he somewhat misapplies the Roman classification of *personae*, *res*, *actiones*); lastly, of the "Means" of Jurisprudence, i. e. the methods by which Justice is brought to bear upon human intercourse (*quibus Finis in Subjectum inducitur*), of which the principal is *Judicium*, or as we should say, "Procedure." *

* In this distribution of his subject one seems to trace the influence of the "Paratitla in Pandectas" of Wesenbecius (1566).

Part II treats of "Rights" in general (*De Jure in genere*) in relation to *personae*, *res*, and *actus*.

Part III is devoted to "Private," and Part IV to "Public" Law, in each case with reference to persons, things, obligations, delicts, and duties. In Parts V-VII, we pass from Law and Rights to the means by which Rights are enforced, namely by "Judicium," in its successive stages of *causae cognitio*, *decretum*, and *coercitio*, first in Private, and then in Public Law; in each case with reference to persons, things, obligations, delicts and duties. All these topics are discussed in the phraseology of the Civil Law, often in sentences taken textually from the Digest and Code. It must be remarked that the work, after dealing fully with Private Law, Public Law, and the Procedure applicable to each, ends somewhat abruptly, without adding a word to what had been said in the First Part as to a *communio inter diversos Principes et Respublicas*. It would rather seem that, although he had there announced his intention of dealing with this topic, it was only at a much later date, and perhaps not till he had carefully studied the great work of Grotius, only very recently published when the "Elementa" was written,* that Zouche seriously turned his attention to it. So much of the general scheme of the "Elementa" as relates to the Law, Public or Private, which is enforced by each State over those subject to its jurisdiction was worked out by him, in detail, in the series of monographs which appeared in rapid succession from 1634 to 1640; but it was not till 1650 that he published anything upon the body of rules which govern the relations of each sovereign State to the rest. He had by then utilized, as it would seem, a period of enforced leisure from Academical duties ("otio non alias felici"), to complete, by the "Jus Feciale," the series of works contemplated twenty-one years previously.

In the new work, we encounter all the distinctions and terms with which the "Elementa," and the monographs which followed it, had familiarized us; notably the distinction between "Rights"

* Grotius complains that few writers had touched upon, and none systematically, "jus illud quod inter populos plures aut populorum rectores intercedit." Proleg. i.

(Jus) and "Remedies" (Judicium). One might thus be led to hope that Zouche had seized, and adopted into his system, the division of subject-matter which has contributed so much to clearness of statement in modern books upon International Law: that namely, between "Peace" and "War"; in other words, between the Rights of Nations, and the Remedy, in the last resort, for the infringement of those Rights. This unfortunately turns out not to be the case. The nomenclature employed in his previous treatises to distinguish between Rights and Remedies is, indeed, still retained. Part I is headed "De Jure inter Gentes," and Part II "De Judicio inter Gentes"; but the contents of these Parts do not correspond to their titles. Both Parts alike treat both of Peace and of War (Part I of Peace in sects. 1-5, of War in sects. 6-10; Part II of Peace in sects. 1-5, of War in sects. 6-10); the distinction between the contents of the two Parts being, as we are warned in the Address to the Reader, between rules which are fairly well established ("quae sunt minus dubitati juris"), which, whether they relate to Peace or to War, he places in Part I; and debatable matters ("quae videbantur juris controversi"), which, whether they relate to Peace or to War, he discusses as open questions, with arguments *pro* and *con.*, in Part II. It might indeed be supposed from the mentions with which this Part commences, of War, Arbitration, Litigation and Pressure of Public Opinion, as the modes in which disputes are settled "between Princes and peoples which acknowledge no superior," that, under the heading "De Judicio inter gentes," we are about to read only of Procedure, having this object in view; but one soon discovers that this is not the case.

Apart, however, from such confusion as arises from the inept classification of topics, just described, the book possesses merits which more than justify the respectful attention which it has received.

(1) Previous writers had dealt piecemeal with isolated topics of the Law of Nations, in works upon "Reprisals," "the Duel," "Legation," "Military Matters," "Military Discipline and

Christianity," "the Justice of War against the Indians," "the Law of War and Military Discipline," "the Alliances and Treaties of Princes," "the Law of War"; till we come to the treatise of Grotius, who does indeed deal with the law both of war and of peace, but subordinates the latter to the former.

Zouche was the first to conceive of the topic as a whole, and to recognize that war, with which his predecessors had mainly busied themselves, is but a means, whereby, in the last resort, the rights which Nations enjoy in time of peace may be vindicated.

(2) He bestowed upon his topic the really descriptive title which, in its translated forms, has largely superseded the ambiguous term "*Jus Gentium*" (still lingering as "*Droit des Gens*," "*Völkerrecht*"), by which it had begun to be known. After examining the ambiguities which beset this term when employed to describe the body of generally received rules which govern the relations of State to State ("*quod inter Principes vel Populos diversarum gentium communiter intercedit*"), he announces his intention of giving to that body of rules, partially dealt with in the Roman *Jus Feciale*, the name "*Jus inter Gentes*" ("*Jus inter gentes placet appellare*"). This collocation of words had, indeed, occurred, as it were accidentally, here and there in the pages of earlier writers, such as Victoria, Vasquez, Suarez, and Grotius, but was now for the first time deliberately adopted as the name of a science which, as a whole, had previously been nameless. The subsequent history of the term is well known. The Chancellor D'Aguesseau, in 1716, commends to his son the study of "*ce qu'on appelle le Droit des Gens, ou, pour parler plus correctement, parceque le nom de Droit des Gens a un autre sens, le Droit entre les Nations*"; so to the same effect, in 1740, the Abbé de Saint Pierre. But it was Jeremy Bentham who, in his "*Principles of Morals and Legislation*," 1789, secured the general adoption of Zouche's suggestion, by coining the term "*International Law*," as "*calculated to express, in a more significant way, the branch of law which goes commonly under the name of the Law of Nations.*"

(3) The work is rigidly methodical, in accordance with a scheme approximately suggested by that followed by the Roman jurists, in distributing the topics of Private Law. Alike in Part I and in Part II, and in each with reference both to Peace and War, the discussion turns successively upon "Persons," "Property," "Duties," and "Wrongs" (*Personae, Dominium, Debita, Delicta*). It can not be said that the topics of International Law are thus classified to the best advantage; nor is the choice of terminology always of the happiest: e. g. "Debitum" is not ordinarily employed to cover "obligationes," whether "ex contractu" or "quasi-ex-contractu." But Zouche could not be expected to anticipate the progress which has been made in the literature of the science during the two centuries and a half which have elapsed since the publication of his book. He did excellent service by working out his system with scrupulous, if somewhat pedantic, diligence; promoting thereby the intelligent study of the subject, and entitling his treatise to the praise long ago bestowed upon it by von Ompteda (p. 252) as "the first text-book of the whole Law of Nations (*Das erste Lehrbuch des gesammten Völkerrechts*), and its author to be described by Rivier as "zweiter Begründer des Völkerrechts."

With these explanations, the very full Table of Contents will tell its own story.

(4) The writer, described by A. Wood as "the living pandect of the law," gives ample evidence here, as in his other works, of his familiarity with the Digest and Code and their commentators, as also with a wide range of classical authors. For initiation into both kinds of knowledge, he gives credit in one of his Dedications to the training which he had received in the two famous Wiccamical Colleges: "a pueritia ultra adolescentiam humanioribus literis et juris studio institutus."

(5) But the work abounds not only in "wise saws" from the Greeks and Romans, but, also, to a degree previously unusual, in "modern instances," gathered from European history; as is

evidenced by their occurrence on pp. 9, 13-15, 22, 23, 26, 28, 29, 34, 52, 55, 58, 62, 64, 65, 74, 79, 81-86, 88-91, 97-99, 101, 103-107, 110, 111, 113, 118, 119, 121-123, 125-128, 130, 131, 134-138, 148-151, 155, 157, 160, 163, 167, 169, 171, 178, 181, 183, 187, 190, 191, 194.

(6) Unlike some of his predecessors, Zouche fully acknowledges the assistance which he has derived from earlier writers, especially from Gentili and Grotius. It has been thought likely to be useful to append to this edition of the work a full Index of authors cited.

(7) The work touches, with a certain amount of repetition, upon most of the topics discussed in books upon International Law at the present day. The references which follow, arranged alphabetically under the two general headings of "Peace" and "War," may facilitate the discovery of the views of the author upon each topic.

On Peace, see, as to *Arbitration*, pp. 54, 57, 75, 76; *Armaments*, undue, iii; *Ceremonial*, 20; *Conflict of Laws*, 61, 65, 67-70; *Domicil*, 68, 121, 122; *Embassy*, 11, 18, 19, 26, 89-103, 155; *Extradition*, 109, 110; *Extra-territoriality*, 62; *Identity of a State*, 63; *Passage*, right of, 112; *Piracy*, 35, 133; *Precedence*, 13, 87-90; *Prescription*, 77; *Privileges*, see Embassy; *Protectorates*, 41; *Salutes*, 132; *Sea*, the ownership of, 73; *Treaties*, 22-24, 28, 103-108, 115; *Usucapio*, 77; *Wreckage*, 73.

On War, see, as to *Assassination*, p. 187; *Declaration*, 3, 183; *Booty*, 37; *Belli Commencia*, 42, 46, 50; *Capitulations*, 165, 167, 172, 190, 191; *Capture*, 124, 125, 126; *Conquest*, 36, 38, 137; *Contraband*, 128-132; *Conventions, military*, 47, 173-180; *Duels*, 146-150; *Enemies, lawful*, 35, 121, 122, *Enemy Ambassador*, 157; *Enemy combined with Neutral Property*, 127; *Fraud*, 50, 185, 186; *Garrison, slaughter of*, 190; *Hostages*, 49, 181, 182, 192; *Just War*, 116, 121; *Neutrality*, 56, 125; *Neutral Territory*, 125, 150, 151; *Pillage*, 37, 126; *Poison*, 186; *Prisoners*, 152, 160, 167, 190, 191, 192; *Prize*, 127; *Property*, when it passes, and when Neutral

should restore it, *ib.* 125; *Ransom*, 52, 134-136, 163, 164; *Retaliation*, 189, 192; *Ship and goods*, 127; *Stratagems*, 44; *Tobacco*, 131; *Truces*, 160, 162; *Victory*, the test of, 152; *Women and Children*, the treatment of, 53, 163, 193, 194.

On the page following the author's address *Ad Lectorem*, there will be found the original list of *Errata*, the length of which is attributed to the imperfections of the copy supplied by the author, and to his absence from Oxford. A careful reading of the text has, however, shown that this list is by no means exhaustive. It has therefore been thought desirable to print at the end of the book a more complete list, in which the *errata* originally indicated are incorporated with those to which attention has now been called for the first time.

The editor has been fortunate enough to secure the services, as translator of the "*Jus Feciale*," of his friend Mr. J. L. Brierly, B. C. L., Barrister-at-law and Fellow of All Souls College, who is also mainly responsible for the further list of *Errata*, and for the *Index of authors cited*.

T. E. H.

OXFORD
25 July, 1910.

IVRIS ET IVDICII
F E C I A L I S,
S I V E,
IVRIS INTER
G E N T E S,
ET QVÆSTIONVM DE
EODEM EXPLICATIO.

Quâ
Quæ ad Pacem & Bellum inter diversos
Principes, aut Populos spectant, ex præcipu-
is Historico-jure-peritis, exhibentur.

Opera R. Z.
Autoris Elementorum Iuris-prudentiæ.



O X O N I Æ,
Excudebat H. HALL, Impensis THO: ROBINSON.
M. DC. L.



Ad L E C T O R E M.

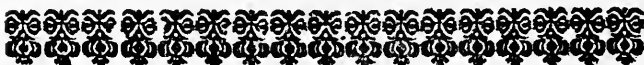


UT HOR Elementorum Jurisprudentiæ pro ratione Communionis, humanæ, Juris & Judicii fundamenta exhibere instituens; primum pro Communione in genere, Juris & Judicii principia generalia: Deinde pro ea, quæ inter personas Privatas, nec non quæ Privatis cum Principibus intercedit; cum Privati, tum Publici Juris, & Judicii regulas tradidit. Postea pro Communione speciali, utpote Sacra, quæ Religionem, & Pias causas, Militari quæ Militiam armatam & Civilem, Maritimam, quæ Navigationem, & Negotiationem, & Feudalem quæ fidelitatem, & Pacem respicit, Juris & Judicii Sacri, Militaris, Maritimi, & Feudalis descriptiones contexuit: Atque in prioribus ad Juris Civilis auctoritates se astringit, ad postremam, scilicet Feudalem, Consuetudines Mediolanenses & Normanicas applicuit. Tandem ad Explicationem eorum quæ ad Communionem, quæ inter diversos Principes, aut Populos intercedit, conducunt, perrecturus, alios auctores nimirum Historico-jure-peritos consulere necesse habuit. E quibus Albericum Gentilem, & Hugonem Grotium pro Coryphæis habendos duxit, utrumq; omnis generis eruditione insignem, quorum ille ad Juris, hic ad Rationis trutinam quæ tradit expendit. Alios etiam Auctores pro subjectâ materiâ adhibuit, & propositis primum quæ sunt minus dubitati juris, ea quæ videbantur juris controversi ad quæstiones redegit. In quibus à statuendo quicquam pro suâ sententiâ abstinuit; Consultis Academiæ Socraticæ institutum imitari ratus, quæ post causas, & rationes allatas, & quid in unaquaq; parte dici possit expositum, Audientium judicium integrum atque liberum reliquit. Hac qualiacunq; sunt, Divina favente Clementia, pro Muneris quod aliquandiu in Academia sustinuit officio in Juventutis studiosæ gratiam otio non alias felici composuit. Quæ si aliis in usum, nec sibi in præjudicium cedant, quod in voto habuit, consequetur.



Cum Errata quamplura, exemplaris minus accurati, & Authoris
absentiae occasione contigerint; Lector rogatur, ut minutiora,
pro suo iudicio, alia prout animadversum est, emendare non
gravetur.

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DE





DE IVRE INTER GENTES, ET DE IVRE PACIS.

PARS PRIMA.

SECT. I.

Jus inter Gentes est, quod in communione inter diversos principes, vel populos, penes quos est imperium, usurpatur. Quod scilicet, Moribus rationi congruis inter Gentes plerasque receptum est, & id in quod gentes singula inter se consentiunt, & observatur inter eas quibuscum Pax est, & inter eos quibuscum Bellum. Pax est inter diversos Principes, vel populos, juxta Concordia, ex qua alii cum aliis securè agunt, ejusque jus, Statum, Dominium, Delictum & Delictum inter eos quibuscum Pax est, respicit.

1.



Quod naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque; jus gentium, quali quo jure omnes gentes utuntur, inquit Gaius Jurisconsultus, estque primum, quo singulorum gentium populi communiter, inter se utuntur; utpote cum apud singulos Homines alii liberi, alii servi; res aliæ communes, aliz in privato dominio; personæ alii ex contractibus, alii ex delictis obligati censentur. Deinde quod inter Principes, vel populos diversarum gentium communiter intercedit, cum ex hoc jure, uti refert

A

etiam

etiam Jurisconsultus, Gentes discretæ sunt, regna condita, commercia instituta, & deniq; bella introducta. Quod est posterioris generis, Jus inter gentes placet appellare, quod apud Romanos, speciali nomine, Jus Fœciale; ab Æquicolis, antiqua gente traditum, vocabatur; ejusq; juris cognitionem, Cicero præstabilem scientiam dixit, quæ in conditionibus Regum, populorum, exterarumq; nationum, in omni deniq; jure Pacis, & Belli versatur. Collegium enim Fœcialium, ut tradit Dionysius Halicarnassensis, à Numa Pompilio institutum est, & eorum officio demandatum est, ut de Pactionibus, fœderibus, de injuriis fociis, aliisq; illatis cognoscerent, de Legatis mittendis, de rebus reposcendis, de Amicitia renuntianda, de Bello indicendo consulere, & quod decretum esset, pro officio exequerentur. De hoc jure libri qui conscripti sunt interierunt. Ejus tamen vestigia, ex libris sacris, ex pandectis, & codice Juris Romani, ex auctoribus Græcis, Latinis aliisq; (quorum sententiæ, & testimonia, quid secundum naturalem rationem, gentium moribus, circa res hujusmodi receptum fuerit, suffragantur) deprehendi possunt, quia cum multi diversis temporibus, ac locis idem affirmant, id ad causam universalem referri debeat, quæ alia esse non potest quam recta conclusio ex naturæ principii proveniens, aut communis aliquis consensus, è quibus illa jus Naturæ indicat, hic jus gentium. Deinde præter mores communes pro jure etiam inter Gentes habendum est, in quod gentes singulæ cum singulis inter se consentiunt, utpote per pacta, conventiones & Fœdera, cum communis reipub: sponso Legem constituat, & populi universi, non minùs quam singuli suo consensu obligentur.

2 Deinde hoc jus inter gentes, obtinet inter eas gentes, aut populos, penes quos est Imperium, vel universalis & summa potestas de iis quæ ad communionem inter gentes cum in pace, tum in bello spectant, decernendi; quia hujusmodi imperio, singulæ personæ, familiæ, & gentes in unum corpus rediguntur, unde omnes idem velle & facere intelliguntur. Multi vero, seu plures homines extra imperium, quorum unusquisq; habet propriam voluntatem, non ut populus, sed ut personæ singulæ agunt, ita ut quot sint homines, tot sint actiones, atq; aliquis in illa multitudine existens, si iis quæ facta sunt, non consenserit, neq; opem tulerit, non fecisse censendus est.

3 Pax est, uti tradit Augustinus, ordinata concordia, quod intelligi

telligi potest, de Pace in genere, cujus species alii accuratius distinguunt, prout ordo superiores respicit, vel aequales; prioris generis habentur Pax Moralis, cum hominis affectus, cum ratione domestica, cum membra familiae, cum Capite, vel Patre familias: & Civilis, cum subditi cum Principe consentiunt. Posterioris generis sunt vicini cum vicino, Civitatis cum Civitate, Regni cum regno, concordia. Pacis cujusque causa, & comes est Justitia, ita Regius Propheta, de Beato saeculo. Misericordia, inquit, & veritas in unum coierunt, Justitia & Pax se invicem deosculatae sunt; effectus Pacis sunt, ut alii cum aliis securè agant, & ut cuique liberum sit suo jure, sine molestia aut impedimento uti, unde à Cicerone Pax definitur, libera tranquillitas, & inter Numina quae Romae colebantur, post concordiam, & Pacem quies celebrabatur, in eo quod poetae fingeant aureo saeculo, universi generis humani conditio pacis composerebatur, quod tum omnes homines iusti, & innocentes habebantur, cum, ut Arnobius tradit, si omnes nationes rationis decretis pacificis ausculta- rent universus orbis in tranquillitate degeret. Postquam vero ex prava ratione, & perversis moribus, alii erga alios male affecti sunt, & qui superiorem non agnoscunt, non habent à quo cohibeantur, evenit, ut pax inter eos principes, aut populos duntaxat interveniat, qui à molestiis, & injuriis abhorrentes in concordiam justitiae congruam quasi speciali quadam propensione, coaluerunt.

Vid. de Iustit. & jure. l. 9. l. 5. D. eod. Dionys Halicarn. l. 2, Rosin lib. 3. c. 21. Bodin lib. 5. cap. ult. Gentile lib. 1. ep. 1. Grotium in Prolegom. 2. Bodin lib. 1. cap. 1. Hobbius de Cive cap. 6. 3. Conradum Brunum de seditionis. l. 1. c. 2. §. 8.

S E C T. II.

De statu inter eos quibuscum Pax est.

Status inter eos quibuscum Pax est, est conditio eorum inter se, & cum aliis, conditio inter se est quâ Civili imperio subjiunguntur, quale est Paternum, Regium, & Populare; Conditio cum aliis est, ex qua alii Amici vel socii habentur.

1. **A**D Communionem inter Gentes pertinet, primum status, vel conditio populorum inter se, quae ab ordine, & regimine

ne pendet, & quatenus spontè, & inter volentes existit, Imperium civile appellari potest, quale fuit primum Parentum imperium, quod ex procreatione liberorum, & propagatione familiarum processit, quod pleno jure competeat Patri-familias, ad procurandum ea, quæ ad sui, & familiæ utilitatem conducebāt. Deinde cum ex numerosa prolis propagatione gentes existerent, & primoribus in descendentes potestas competeret, (nam appellatione parentum, etiam avus, & proavus & deinceps omnes ascendentes continentur) evenit, ut in gentes integras hujusmodi imperium diffunderetur, unde ut in sacris literis plurium familiarum primores Patriarchæ, ita in jure Civili, Principes familiarum insigniuntur. Hoc regimen in rebus civilibus à primævis parentibus usque ad Nimrodi tempora, quemadmodum potestatem in rebus sacris veteris Testamenti, apud Patriarchas, seu Capita familiarum in suis cognitionibus, ante & post diluvium usque ad Moysen permansisse Theologi tradunt.

2. Regium imperium, est potestas unius in populum quæ aliquando absoluta erat, quam Aristoteles Παμβασιλεια vocat, cum unus ad utilitatem communem, omnia ex voluntate agere, & imperare potuit, nec cuiquam rationem reddere tenebatur, unde ut αὐτοκρατορ, sive in se sufficiens, ita & ἀντιστοιχῶν, id est, nullius auctoritati obnoxius dicebatur, cujusmodi imperium ad exemplum Paterni institutum tradit. De quo etiam Justinus, Principio, inquit, rerum, Gentium, nationumque imperium penes Reges erat, quos ad fastigium hujusmodi majestatis, non ambitio popularis, sed spectata inter bonos moderatio provehebat, populus nullis legibus tenebatur, arbitria principum pro legibus erant, intra suam cuique patriam regna finiebantur. Et de regimine Romano, Pomponius Jureconsultus, initio quidem nostræ civitatis populus sine Lege certa sive jure certo primum agebat, omniaque manu a Regibus gubernabantur. Deinde potestas Regia erat alia legibus conformis, quale imperium erat quod Aristoteles Heroicum appellat; alia etiam magistratibus obnoxia, veluti Regum Lacedæmoniorum, Eporis; alia tempore vitæ, ut primorum Regum Romanorum, terminabatur.

3 Tertiò, Populare imperium est ubi populus, à Principis cuiusque auctoritate liber, & immunis, universam potestatem penes se retinet, quemadmodum exactis regibus, erat penes populum Romanum

manum, & vel paucis virtute præcellentibus qui optimates dicuntur conceditur, quæ species imperii Aristocratia dicitur; vel ab universis omnium scilicet vel majoris partis suffragiis, exercetur, quæ species Democratia appellatur. Denique principes, & populi penes quos est imperium, alii majores, & potentiores sunt, quorum copia latius diffunduntur, alii minores, & imbecilliores, quorum vires angustioribus finibus includuntur.

Secundo, status vel conditio Principum, vel populorum cum aliis in pace, est ex qua Amici aut Socii habentur. Nam quemadmodum de privatis tradit Jureconsultus, Amicos esse, accipiendo, quibuscum sunt jura honestis familiaritatis rationibus quæ sita, ita inter diversos Principes, vel Populos ratione ejusdem Originis, Vicinitatis regionum, communis linguæ, benefaciendi sibi invicem opportunitatis, & similium, cum aliis, præ aliis familiarius agitur, unde ex amicitia competit jus Hospitii, & Commerci; ita Pomponius Jureconsultus ait, Gentes esse cum quibus neque Amicitiam, neque Hospitium habemus, & Solebant Romani aliquos pro beneficio hospitio donare, ita cum Legati eorum qui craterem aureum donum Apollini Delphos ferebant, à piratis intercepti Liparas devecti essent, ubi partem prædam dividere mos erat, & Timasitheus qui eo anno in summo magistratu erat, Legatos in publicum hospitium adductos, cum præsidio navium Delphos prosequutus, domum inde hospites restituisset. Hospitium cum eo ex Senatusconsulto factum est, donaque ei publicè data. Ad Commercium spectat quod Arco in Concilio Ætolorum, pro Amicitia cum Perseo Macedoniae rege habenda disseruit, Opportuni, inquit propinquitate Macedoniae sumus Commercium juris præbendi, repetendique sit, ne interdictione finium nostrorum, nos quoque regno, id est Macedonia arceamus. Quod & fuisse Bodinus explicat, ut liceat, in aliorum fines ire, agere, negotiari, res rationesque contrahere, & liberam mertaturam quarundam rerum, aut omnium ultro citroque exercere. Cum, uti Proculus ait, Alii apud nos libertatem suam, atque Dominium rerum suarum, æque atque apud se retineant, & eadem nobis apud eos contingant.

5 Deinde, sicut inter privatos, veluti inter ejusdem familiae confortes, & cohæredes, societas habetur, ex qua Lucri & Damni communis participes ad se invicem juvandum sunt astricti, ita: inter diversos

versos Principes, vel populos ad sustinendum securitatem communem, & ad arcendum impendens periculum, quod ad omnes ejusdem Agnationis, Religionis, Conditionis, &c. pertinere potest, arctius societatis vinculum intercedit, ex quo invicem vires, & auxilia conferre parati sunt, cum, ut Annibal in Concilio Antiochi, communis utilitas Societatis maximum sit vinculum; itaque cum Philippus Macedoniae Rex Atheniensibus bellum intulit, Thebani ultro se junxere, Athenienses vero Legationibus totam Græciam fatigabant, inquit Curtius, communem hostem communibus viribus submovendum existimantes, ita etiam Campani pro Sidicinis, contra Samnites, inquirunt, Pugnavimus, verbo pro Sidicinis, re pro nobis cum videremus finitimum populum, nefario latrocinio Samnitium peti, & ubi conflagrassent vicini, incendium illud ad nos trajeclurum esse. Romani reges externos cum quibus pacem colebant, & præclare de ipsis meritos, pro honore, Amicos, & Socios compellabant. Ita, Cognitis Ptolomæi, in bello contra Tacfarinatem studiis, repetitus à Tiberio vetustus mos est (inquit Tacitus) missusque unus è Senatoribus, qui scipionem eburneum, togam pictam antiqua Patrum munera daret, Regemque, & Amicum, & Socium appellaret. Cùm verò Vermina, filius Syphacis, qui auxilium Carthaginensibus præbuisset, à Senatu Romano peteret, ut Rex, Sociusque, & Amicus appellaretur, responsum est, Pacem ejus sine causa, ex amico & socio hostem repente populi Romani factum, & ipsum, in bello lacescente Romanos adolescentiæ rudimentum posuisse, itaque pacem illi prius petendam, quam ut Rex, Amicus, Sociusque appellaretur, ejus nominis honorem, pro magis erga Rempublicam meritis dari.

Vid. 1 Bodinum, lib 1. cap. 4. Lambard. *Archion*, c. 1. D. Prideaux *Introductio*, ad *Hyfhortiam* Monarch. 1. *Bucanum* *Loc. Common.* 42. § 6. 2 *Aristot.* *Polit.* lib. 3. cap. 11. *Iustinum* lib. 1. in princip. 3 *Aristot.* *polit.* lib. 3. c. 5. & 10. *Bodinum* lib 2 cap. 1, 2, &c. 4 *Arniseum de jure Magistratus*, lib. 1. cap. 4. § 4. *Gentilem* lib. 1. cap. 15. lib. 3. cap. 8. 5 *Curtium* lib. 1. &c.

SECT: III.

De Dominio inter eos quibuscum Pax est.

Dominium inter diversos Principes, vel Populos quibuscum Pax intercedit, est, Jus quod in rebus, præcipuè territorii, absque aliorum præjudicio seorsim obtinet, cujusmodi Jus vel Plenum, vel Hereditarium, vel usu-fructuarium tantum habetur.

AD Communionem in pace pertinet etiam Dominium, Jus scilicet, quod in rebus principibus, & populis absque aliorum injuria, aut damno competit, cujusmodi dominium in bonis mobilibus, iisdem modis plerumque, quibus inter privatos contingit. Nec multum dissimiles sunt modi, quibus etiam res immobiles, veluti urbes, & regiones in eorum dominium veniunt, quæ cum in iis imperium, vel potestas in personas exercetur, Territoria, & regna appellantur, & vel pleno jure, vel hereditario, vel usu-fructuario tantum possidentur. Primum, à populis omnino, à principibus aliquando, regna vel territoria pleno jure habentur, ita Strabo tradit, Cytheram insulam Tanaro objacentem, fuisse Euriclis, Lacedæmoniorum principis; privato ipsius jure, & ejusmodi sunt quæ occupatione, & præscriptione acquiruntur, Donatione, & dispositione testamentaria, ad alios transferuntur; occupatio est eorum, quæ nullius fuerunt, quo modo Noachis filii, post diluvium, regiones sortitæ sunt; cum à Japheto Shemo & Chamo regiones separatæ sunt, per terras eorum, quæque gens secundum familias, in gentes suas. Eodem pertinet, quod in posterioribus sæculis loca inculta, insulæ in mari, & partes maris in proprium dominium occupatione devenerunt. Occupationi accedit præscriptio, cum Regiones, quæ alicujus fuerunt, ab ipso derelictæ ab alio longa possessione acquiruntur, ita Jephthes Regi Ammonitarum, vendicanti terras inter Armonem & Jabocum, ab Arabum deserto ad Jordanem sitas, annorum trecentorum possessionem objecit, & ab ipso quasivit cur ipse, ejusque majores, tanto tempore cessavissent. Ad donationem spectat quod Rex Solomon Píramo, Regi Phœnicum urbes viginti dedit, Agamemnon apud Homerum, se septem

septem urbes Achilli daturum pollicetur, Rex Anaxagoras Melampodi duas regni partes dono dedit; Testamentaria dispositione, Abrahamus statuit, si sine liberis decessisset, res suas Eliezero Oeconomo relinquere, Molossus nothus ex iudicio Pyrrhi liberos legitimos non habentis, in Regno Epiri successit, Mithridates apud Justinum ait, Paphlagoniam non vi & armis, sed adoptione testamentaria patri suo obvenisse. Attalus Rex Asiae minoris, & Nicomedes Rex Bithyniae populum Romanum heredem fecerunt, Lybia pars Cyrenaica, eidem populo ab Apione rege testamento relicta, & Regnum Aegypti testamento Regis Alexandrini ejusdem populi Romani factum est.

2. Secundo, Hereditario jure regna possidentur, ad quae ex successione jus competit, hujusmodi successio, vel antiquior est, in quo proximus ultimo defuncto respicitur, vel posterior in qua etiam descendentiū à primo Rege ratio habetur. In priore ex sexu & aetate praeratio erat, ita Herodorus, Mos, inquit, est omnium populorum, ut natu maximus imperium habeat, & apud Justinum, Artabazanus natu maximus, aetatis privilegio regnum vendicabat, quod & ordo nascendi, & ipsa natura gentibus dedit; nisi major natu esset illegitimus, quo in casu Macedones Demetrio minori, potius quam Perseo majori regnum deberi censuerunt. Deficientibus filiis succedebant filiae, ita Justinus dixit Medorum imperium ad filiam pertinuisse, quod Astyagi nullum virilis sexus genus erat, & Cyrus aiebat Mediam filiae suae deberi, quod ipsi filius mas legitimus non erat, Quod si defuncto Regi nec filii, nec filiae supererant, frater ad successionem admittebatur; ita cum Polydeces Lacedaemoniorum Rex, sine liberis decessisset, Lycurgus frater, aliquandiu regnum adeptus est. Successio in qua etiam descendentiū à primo Rege habetur ratio, Linealis dicitur, & à linea recta ad collaterales transit; Linea recta est, liberorum, nepotum, & pronepotum, &c. Linea collateralis est fratrum, patruorum, avunculorum, & sic deinceps, in utrisque quot personae sunt, si descendentes habuerint, tot lineae possunt existere. E quibus propior excludit remotiores; propioribus deficientibus, etiam remotissimae admittuntur. Estque haec successio linealis, vel agnatica, qua soli mares succedunt, & jus ad mares transmittunt, quod in regno Francico obtinere dicitur: vel cognatica, quae & mares, & feminae admittuntur, habitio

habito in quolibet gradu respectu primo sexus masculini, deinde majoris ætatis, ita ut ob sexum, vel ætatem nunquam de linea in lineam transeat, & huiusmodi successio in plerisque aliis Europæ regnis observatur. De hisce regnis aut partibus in præjudicium successorum, & populi, absque eorum consensu alienatio, aut testamentaria dispositio non permittitur. Itaque Angli, irritam habuerunt regni traditionem, quam Rex Johannes Pandolpho Pontificis Legato, inconsultis proceribus, fecerat, & Scoti imperium Anglicum, quod Johannes Balliolus invitis induxerat, non sustinuerunt, & Franciscus primus Rex Galliarum, qui captivus Carolo quinto provincias aliquot Burgundiarum cedere promiserat, cum, quamprimum ad terram appulerat, à Proregis Neapolitani comitatu, ad id præstandum requisitus fuit, respondit, necessarium sibi ad id subditorum Burgundiarum consensum adhiberi, quos in Comitibus contulere statuit. Idem statuitur de dispositione testamentaria, itaque cum Philippus rex Macedoniarum, in animo haberet, Antigono fratris filio, excluso Perseo, qui eum ad Demetrium filium occidendum sceleratè induxerat, regnum relinquere, ut consensum subditorum conciliaret, Macedoniarum urbes circumivit, principibusque, Antigonom commendavit, & quamvis Carolus magnus, & Ludovicus pius de regnis testati legantur, id commendationis vim apud populum magis habuit, quam veræ dispositionis, atque id de Carolo speciatim Ado memorat, voluisse eum testamentum suum à Francorum Optimatibus confirmari. Ubertus Princeps Delphinatus cum liberis destitueretur, principatum, post mortem, Regi Gallorum detulit, eâ lege, ut primogenitus Regis, Delphinus, perpetuo vocaretur, sed in id proceres regni prius consenserunt, qui Principatum in Galliarum Regis filium, potius quam in Pontificem Romanum (cui vendere decreverat) conferre persuaferunt.

3. Tercio, iure usufructuario tantum regna habentur, quæ Reges ad tempus vitæ duntaxat obtinent, quibusque defunctis, alii, populi suffragiis, vel eorum qui à populo potestatem delegatam habent, promoventur, Tale fuit regnum post Romulum Numæ, Pompilii, Tulli Hostilii, & aliorum qui rei Romanæ fundamenta jecerunt, & post Augustum Cæsarem, Imperatorum in rerum magnitudine subsequentium. Tale habetur Imperium Germanicum, regnum Hungariæ, Bohemiæ, Poloniæ, Daniæ, & Sueciæ, ad quæ principes per

suffragia ad regale fastigium ascendere perhibentur, quorum plerique in admissione iuramentum suscipiunt, regnorum conditiones deteriores non facere, aliqui etiam provincias, quæ ab alienatæ sunt, repetere; itaq; cum Fredericus secundus Sardiniam, quam Romana Ecclesia sibi vendicarat, repeteret, eumque Pontifex iuramenti de rebus Ecclesiæ defendendis præstiti, moneret, respondit, se prius iurasse ad res Imperii repetendas, è quibus cum Sardinia per injuriam ablata fuisset, priori iuramento se fortius constringi, potioresq; ipsi esse debere partes imperii, quæ meliori jure instructæ erant, quam causam Romanæ Ecclesiæ. Etiam si alii, hujusmodi iuramenti minus memores videntur, ut Carolus quartus, qui regnum Arelatense in Gallos transfudit, Ludovicus Bavarus, qui Helvetios se à corpore Imperii sejungere permisit, & Rodolphus Habsburgensis, qui Cancellarium suum in Italiam misit, ut acceptâ pecunia, populos quoscunq; ab Imperio liberos, & immunes faceret, quo tempore Florentini sex millibus, Lucenses duodecem millibus nummorum libertatem redemerunt.

Vid. Grotium lib. 1. cap. 3. §. 1. 2. eundem lib. 2. c. 3. §. 7. cap. 4. §. 2.

2. Grotium lib. 2. cap. 7. §. 12. 13. & lib. 1. c. 7. §. 12. Arniseum lib. 3. c. 1. nu. 10.

3. Arniseum lib. 3. cap. 1. nu. 11. 14. 15.

SECT. IV.

De Debito inter eos quibuscum Pax est.

Debitum, sive Officium, inter eos quibuscum Pax est, est quod præstandum est, inter diversos Principes, vel populos quibuscum Pax intercedit, veluti jus Congressus, Legationis, Conventionis, & Fœderis Civilis, cui fides interponitur, vel iurjurandum solenne adhibetur.

1. **I**nter ea, quæ in pace, inter diversos Principes, vel populos debentur, præcipuum est Jus Congressus, sive colloquii civilis, ex quo ipsi, vel eorum Delegati, inter se conveniendi & de negotiis tractandi cum dignitate, & securitate potestatem habent. Ad dignitatem conducit, primo 1. ut potentioribus ad colloquium adventantibus, alii principes, vel personæ illustres obviam procedant, nam

nam hoc genus Officii, cum benevolentia, tum observantia indicium habet, itaque magnifica decreta, populi Atheniensis, super occursum, & acceptione Attali memorat Polybius, Senatus Romanus Legatos misit, qui quam longissimè occurrerent Galbæ ex Hispania venienti Romam, nempe Narbonam usque, qui ei verbis reipub, plurimam salutem dicerent, rogarentq; studiis univerforum daret, ut quamprimum ad urbem accederet, ita Cyrus, adventanti Cyaxari avunculo, assumptis quatuor nationum Equitibus obviam processit & Theodosius, Athanasio à Germanis pulso, ex urbe Constantino- poli longo itinere occurrit. Secundo ad dignitatem refertur, ut qui inferior est ad superiorem accedat, Cum Perseus, Philippi Macedoniz Regis filius, cum Martio Consule Romano ad colloquium prope venisset, dirimente affine, (verba sunt Livii) paulisper internuntiando cunctatio fuit, uter prius transgredederetur, a liquid Regii Majestati regia, aliquid Legati populi Romani nomini, præsertim cum Perseus petiisset colloquium, existimabant deberi, tunc joco Martius cunctantes movit, minor inquit ad majorem, (& quod Philippi ipsi nomen erat) filius ad patrem transeat (quibus verbis majestatem Romanam condidit privata comitate.) Facile id persuasum Regi est. Ita Artabanus Rex Parthorum, qui unus prope triumphis Romanis defuerat, tantopere suspexit Romanum fastigium, ut Legatos ad Germanicum miserit, per quos, præter fœdus, & amicitiam pollicitus est, se daturum honori ejus, ut ripam Euphratis ad ipsum accederet, & ex eadem ratione, Sleydanus refert, Franciscum primum Gallorum Regem, Carolo quinto Imperatori concessisse, ut ad aquas mortuas, colloquio destinatas primus appelleret, unde fastuosum habebatur Ariovisti ad Legatos Cæsaris responsum, si quid ipsi à Cæsare opus esset, se ad eum accessurum fuisse, si quid autem Cæsar à se vellet, ad ipsum veniret. Huic affine est, ut qui inferior est, superiorem conveniens pro honore prius equo descendat: ita Tiridates, Rex Armeniz, cum venisset ad locum sui ipsius, & Corbulonis colloquio destinatum, viso Corbulone prior equo dissiluit. At Crassus re perditam cum equo descendisset, & ad Surenam tenderet, & Surenas, ut eum visit, irridens. Quid hoc dixerit? pedes it Romanus Imperator, & nos equo infidemus? Respondit Crassus, ex necessitate, sed tanquam ex dignitate, neuter, inquit, peccat, patrio uterque more congregientes, Nam Parthus, ut ait Tacitus, equitatu stat, Ro-

manus Legionum agminibus. Idem respicitur in exceptione ad epulandum. Nam cum Caius Cæsar, ab Augusto in Syriam missus, cum Rege Parthorum coiisset, prior Parthus apud Romanum in ripa Romana, posterior hic apud Regem in Hostili epulatus est. Tercio pro dignitate observatur, ut in congressu, qui inferior est apud superiorem prius verba faciat, itaq; cum Antigonus æquum censeret Eumenem sibi ut præstantiori loqui, Eumenes animosè respondit. Neminem me præstantiorem judico, quoad fuerim Gladii dominus. Titus Quintius Consul, uti refert Livius, ut ventum est ad colloquium cum Philippo Rege Macidoniæ, rogatu Regis dicere cœpit; unde liquet, cum Rex impetraret à Consule, ut prior diceret, eum agnovisse, se ipsum, ut minorem, prius loqui debuisset. Et Sylla in Congressu ipsius, & Mithridatis disertim Regi dixit, supplicantium esse, ut prius loquantur, victorum, ut taciti eorum preces excipiant. Deinde in congressibus & colloquiis permittendum, ut securitati consulatur, ne vel numerus comitum, vel opportunitas loci insidiis occasionem præbent, itaq; cum Perseo, ad Martium transgredi placuisset, aliud, inquit Livius, deinde ambigebatur, cum quam multis transiret, Rex cum omni Equitatu transire eum æquum censebat, Legati vel cum tribus venire jubebant, vel si tantum agmen traduceret obsides daret, nihil fraudis fore in colloquio isq; Hippia, & Pantaucum Principes, amicorum obsides dedit; Livius vero ait, non tam in pignus fidei obsides dati erant, quam ut appareret focis, nequaquam ex dignitate pari congredi Regem cum Legatis. Ad evitandum occasione loci insidias, aliquando è navi ex altera parte habetur colloquium, ita cum Philippus Rex Macidoniæ, & Titus Quintius Consul Romanus, ad litus prope Nicæam, ad Colloquium convenissent, Romanus, uti refert Livius, ad extremum litus progressus, quum Rex in proram navis in anchoris stantis provenisset, Commodius, inquit, si in terram progrediaris, ex propinquo dicamus invicem, audiamusq; quumq; Rex id faciurum se negaret, quem tandem, inquit Quintius, times? ad hæc ille regio animo, neminem equidem timeo præter Deos immortales, non autem omnium credo fidei, quos circa te video, atque omnium minimè Ætolis, inter quos erat Phaneas eorum Prætor; illud quidem, ait, Romanus, par omnibus est periculum, qui ad colloquium congregiuntur, ut in nullo sit fides, non tamen inquit Rex, par perfidiæ præmium est, si fraude agatur,

gatur, Philippus, & Phœneas, neque enim aquè difficulter *Ætoli*. Prætores alios, ac *Macedones* Regem in meum locum substituent. De congressu *Edvardi* quarti Regis *Angliæ*, & *Ludovici* undecimi Regis *Galliæ*, ita scribit *Cominæus*, cum locus colloquutioni idoneus circumspiciendus esset, ad eam rem conficiendam, se cum *Boccatio* à Rege missum, ab *Anglis* *Hauardum* & *Chalonerum*, cum *feciali*, diligenter inspecta omni regione, & ora illa, quæ est ad *Somiam* flumen, visum esse opportunum locum *Picennium* oppidum, tribus infra *Arabianum* milliaribus, ibique placuisse efficiendum esse pontem, in quo Reges congregerentur, in medio ponte fiebant cancelli, mediocri altitudine, qualibus coerceri *Leones* solent, ejus foramina erant ea magnitudine, ut brachium aliquis latè infereret, superne erat tota contabulata, pluvie arcenda causa, ita quidem ampie, ut utrinque duodecem consisterent, Illi cancelli complectebantur, utramque oram pontis, sic ut nullus transitus in alterutram partem pateret, Ad flumen solum erat una scapha, cum duobus vectoribus. Rebus ad colloquium paratis, postridiè eo veniunt ambo Reges, & *Ludovicus* prior, cum octingentis cataphractis, *Edvardus* autem cum omni exercitu, sed duodenos tantum singuli secum adducunt, & interea dum colloquuntur, ex ipsis quatuor erant destinati utrinque tanquam inspectores eorum, quæ utrinque gererentur cum rege præter alios aderant *Johannes Borboniæ Dux*, ejusque frater *Cardinalis*, posteaquam *Edvardus* eo venit, comitatus inter alios fratre *Clarentiæ Duce*, complectuntur se invicem valde amantèr per foramina sapienti, & *Ludovicus* sermonem inchoans, Adventus inquit tuus *Cognate* mihi longè gratissimus, adeo quidem ut nullius hodie principis conspectu, & colloquio malim frui, eoque nomine gratias ago immortalis Deo, cujus beneficio hic perpetuæ amicitie firmandæ convenimus, Ad ea cum *Gallicè* respondisset *Edvardus*, ejus *Cancellarius* sermonem excepit, & hujusmodi sunt quæ in congressibus principum, & eorum qui principum loco habentur observari solent.

5. Denique in congressibus & colloquiis eorum qui principum Delegati sunt, dignitatis eorum quorum personas sustinent ratio etiam habenda est, ex qua primum, alii alios præcedere, & superiori loco confidere æquum censent, unde *Mendoza* Regis *Hispaniæ* Legatus in Concilio *Tridentino*, cum indigne ferret, quod in-

ter Regios Legatos supremus locus ipsi non concederetur, dixit, se nolle quidem anteire, sed nec cogi posse, ut Francorum Legatos sequeretur. Cum Sylla allatis tribus sedibus, unam Ariobarzani, alteram Orabazo Arsaces Regis Persarum Legato dedisset, tertiam, eamque mediam sibi sumplisset, & ince Orabazum edentem mandata audisset. Arsaces Orabazum reversum necavit, quia Syllæ loco cesserat. Secundo pro Personarum præstantia ordo loquendi, & nationis sermo observatur, ut qui digniores sunt loquendi vices fortiantur, ita in Concilio Ætolorum, uti refert Livius, etsi primus erat locus Magnitudinis Romanæ, tamen permissu Legatorum Romanorum, Athenienses, & Macedones primo loco dixerunt, ipsi ultimo maluerunt, ut objectis respondere possent. Nationis proprio sermone uti, pro honore esse ostendit, quod refert Cicero sibi à Verre pro crimine objectum, quod in Senatu Græco, hoc est Syracusano, græcè verba fecisset, & de Augusto perhibetur, quod quamquam sermone Græco alioquin promptus, & facilis, non tamen usquequaque usus est, abstinuitque maximè in Senatu. Militem quoque græcè testimonium interrogatū, nisi Latine, respondere vetuit. Itaque cum in congressu Legatorum Angliæ, & Hispaniæ, de sermone adhibendo quaestio haberetur, & Legatus Regis Hispaniæ, quasi dignitati Elizabethæ Reginæ Angliæ aliquid concessurus, Dalo Jurisconsulto ejus Legato, jocosè dixit, in lingua Gallica tractabimus, quia Domina vestra est Regina Galliæ; Dalo (quem Bodinus alibi virum non minus scientia, quam honore egregium appellat) respondit, quasi parem honorem Regi Hispaniæ relaturus, immo inquit, si placet, in lingua Hebraica, quia Dominus vester est Rex Hierosolymarum. In his vero aliquando ad tollendam discordiam, consultius habetur, æqualitatem, vel modum aliquem medium adhibere, quemadmodum refert Cominaeus, in colloquio in Ducis Mediolani palatio habita, ex altera parte Legatos Imperatoris, Regis Hispaniæ, & Principum Italiæ, ex altera parte Legatos Regis Galliæ collocatos, & Gannæum Jureconsultum à Rege Galliæ adjunctum, ut Latine verba faceret. Deinde duos scribas adhibitos, quorum alter Gallicè, alter Italicè, quæ dicebantur, scriptis mandaret.

6. Sicut in congressibus, & colloquiis, ita etiam in literis & scriptis inter Principes, pro dignitate personarum, debiti honoris observantia

observantia exhibenda est, unde si quid circa titulos omissum sit, pro vilipendio habetur, itaq; cum in Naumburgensi conventu anno 1561. Pii Quinti Pontificis literæ, ad Augustum electorem Saxonæ, & reliquos Protestantium Principes, per Legatos traditæ essent, cum hac inscriptione, Dilecto filio, Nobili viro, N. N. Electori, Duci, Langravio &c. Cum plusquam nobiles se existimarent, literas resignare, aut aperire haud dignati sunt, sed eas clausas, & feratas in hospitium Legatorum remiserunt, ut Thuanus refert, & Gustavus Adolphus Rex Sueciæ, cum ab Electoribus responsum prioribus suis literis accepisset, in quo titulus Regius mittebatur, alias ad eos literas dedit, in hunc sensum, Vestrum ad literas nostras superiori anno responsum, accepimus, quod ut resignaremus, etsi primo intuitu, vix in animum inducere potuimus, propterea quod nobis titulum à Deo solo, & majoribus nostris acceptum, quemque viginti annos, valida manu nobis asseruimus, & porro usq; ad extremum vitæ spiritum, constanter asserere decrevimus, tamen illud hac conditione referavimus, ne huiusmodi in posterum præjudiciis amicitia nostra violetur. De quo Electores postea, ita se excusant Serenissime Rex, etsi in literis nostris quoad titulum aliquid defuerit, id tua Majestas non ex animo alienato, & qui ipsius honori aliquid detrahere cupiat, sed ex usu & consuetudine, quam etiam erga alios Reges observamus, profectum esse sibi persuadeat. Idem habetur, si Principes inferiores in literis, sua nomina principum superiorum nominibus præponant, Quod ejusdem Regis Sueciæ ad eosdem Electores aliis literis observatum, in quibus significat se literas eorum accepisse, & ex inscriptione convenienti agnovisse, illam meliori forma conceptam esse, quam in prioribus propter defectum Regii tituli, sed postquam illas resignasset, se non parum mirari, cur contra morem usitatum, & stylum consuetum in literis Electoralibus, non tantum ad se, sed etiam ad alios Reges, ipsorum nomina præponerentur, quasi data operâ ageretur, ut aliis ante regium suum nomen positis nominibus, suæ regiæ dignitati, atque eminentiæ aliquid derogaretur, se autem, quicquid in hac re quæsitum fuerit, id in eam partem interpretari, ac si erratum culpa amanuensium admissum esset &c. Quod etiam confirmat Adriani Pontificis satis elata ad Fredericum primum epistola, in qua ille, Miramur, inquit, quod Beato Petro, & Sacræ Romanæ Ecclesiæ, non tantam reverentiam,

rentiam, quantam debes impendis, cum in literis ad nos missis nomen tuum nostro præponis, in quo insolentia, ne dicam ignorantia notam incurris. Cui congruit, quod observatur in glossa, celebris, sed suspecta Legis quæ incipit Inter claras, Cod: de summa Trinitate, cujus inscriptio sic se habet, Gloriosissimo & Clementissimo filio Justiniano, Augusto, Johannes Episcopus urbis Romæ, ubi Accursius, Nota, inquit, olim Papam in Epistola, quod hodie non faceret. nomen imperatoris, suo nomini præponere.

Secundo, in Pace inter diversos Principes vel populos est Jus Legationis civilis, Legatio, quam Græci ἐκδημιον πολιτῶν, sive externam administrationem vocant, est negotii publici, cum exteris per aliorum ministerium procuratio, Quæ propriè sic est cum ab iis procedit qui summum imperium obtinent, impropriè, & quasi, cum ab aliis proficiscitur; utpote à Colonis, Municipiis, vel Provinciis Cujus generis sunt, ut plurimum de quibus in titulis Juris civilis de Legationibus tractatur, Sed & in civilibus discordiis, ab una parte reipub. ad aliam, utpote à plebe, quæ secesserat in Aventinum ad Patres, Legationes mitti dicuntur, & à primoribus partium ad primores, ut à Caio Manlio ad Martium Regem, à Bruto, & Cassio ad Antonium, & Lepidum Legati cum mandatis transisse memorantur. Deinde Legationes aliæ Religiosæ, aliæ Officiosæ, aliæ Excubitoria, aliæ Necessariæ denominari possunt. 1.º Religiosæ cum ad rem aliquam sacram peragendam legati mittuntur, ut cum post cladem acceptam ad Cannas, Fabius pictor Delphos missus est à Romanis ad sciscitandum oracula, quibus precibus, & supplicationibus Deum placare possent, M. Pompeius Matho, & Quintus Catulus eodem missi sunt ad portandum dona ex præda ab Hasdrubale capta. 2.º Legationes officiosæ sunt, quæ uti Tacitus, officii ergo instituuntur, utpote cum mittuntur, qui gratulari, dolere, atque id generis alia, peragere in mandatis habent, quæ ita verè dicuntur cum ab inferioribus ad superiores destinantur, Sic Officiosæ legationes ex omnibus Regionibus terræ adierunt Alexandrum: Cum vero à paribus ad pares mittuntur, Honorariæ, vel honoris ergo nominantur. In iis censentur, primum gratulatoriæ, quales fuerunt, de quibus Rhodii in Senatu Romano mentionem faciunt. Carthaginiensibus victis, Philippo, Antiocho superatis, cum Romam venimus vobis gratulatum ex Curia in Capitolium, ad Deos vestros dona feren-

tes

tes deducebamur, ita cum Perſes duxit uxorem filiam Seleuci, celebratæ ſunt nuptiæ gratulationibus, donisque innumerabilium legatorum, & veluti auſpiciſus nobiliſſimis populis deductæ ſunt, Ejuſmodi ſunt legationes principum quæ ad inaugurationes regum emittuntur, quas Pontifex Romanus adeo ſibi ex officio debitas cenſet, ut Pontifex, uti Guicciardinus ſcribit indignatus ſit Regi Catholico, quod ſibi recens creato pro more majorum Legatos ad oſculandos pedes non miſiſſet. Secundo Officii vel Honoris cauſa habentur quæ conſolatoriæ, quæ ad dolorē leniendum, vel dolorem teſtandum miſſæ ſunt ut cum David legatos Ammoni Ammonitarum Regi, qui eum poſt mortem patris conſolarentur, & Athenienſes Cteſiphontem ad Cleopatram Philippi filiam ob exceſſum Alexandri Regis Moloforum ablegarunt, quæ niſi tempeſtivæ, ingratiæ habentur, Quod teſtatur Tiberii Ilienſibus reſponſum, Nam cum hi poſt mortem Druſi, ſerius ad eum conſolandum ſe veniſſe dixiſſent, quaſi jam obliterata doloris memoria aiebat, Se quoque earum vices dolere, quod egregium virum Heſtorem amiſiſſent. Tertio Huc etiam ſpectant quæ ad Benevolentiam oſtendendam deſtinatæ ſunt, ut cum Choſrois Perſarum Regis Legatus, cum donis ad Juſtinianum Literas dedit, quæ hoc tantum loquebantur, Choſroem cupere fieri certiorē ut valeat Imperator, & cum Porus Rex Indicus per Legatos miſit ad Auguſtum literas, quibus profitebatur, quamvis ipſe eſſet Rex ſexcentorum Regum, tamen ambire ſe amicitiam Cæſaris, paratumque dare illi tranſitum quæcūque voluerit, & ipſum re quacūque poterit, gratificari, &c. Hæ Legationes ad particulare aliquod, & certum negotium comparatæ ſunt quemadmodum & aliæ ad petendum aliquid quod uſui publico eſſe poſſit, ut cum Decemviri Graciam à Romanis ad petendas Leges, quæ poſtea in Duodecē tabulas redigebantur, ablegati ſunt Pub. Gabinius, Marcus Ottacilius, Lucius Valerius, reſtituto Capitolio Legati Erythras miſſi, qui carmina Sybillæ conquiſita reportarent; Ptolomæus Philadelphus, ad Eleazarum ſummi Pontificis Judæorum, ad petendū Juſu Judaicū ſeptuaginta ſacrorū librorum interpretibus uſus eſt Legationes Ordinariæ, ſive aſſiduæ, quæ & Excubitoræ dici poſſunt, quæ non definitum, aut certum aliquod negotium, ſed ad tempus obeuntur, quibus qui funguntur, vulgo Reſidentes appellantur,

quorum est, dum in legatione manent, omnia quæ à remittentis fuerint, tractare, agere, & prout imperatum fuerit expedire. Cujusmodi legationes antiquis fuisse incognitas multi existimant, speciem vero aliquam similem iis habent, quæ cum Proconsulibus in Provincias, & Imperatoribus in exterarum regiones mittebantur. Legationes extraordinariæ sunt, quæ prout res, & negotia publica requirunt, necessaria habentur, in quibus de conventionibus, Fœderibus Civilibus, & similibus tractatur.

3. Legationibus obeundis adhibentur, aliquando personarum singulæ, aliquando plures, pro conditione negotii, aut dignitate eorum ad quos mittuntur, Romanis in more erat unum Legatum mittere, sed ipsum Senatorium, ad Reges appellandum, sive agnoscendum, eisque munera deferendum. Ab aliis gentibus ad potentiores plures mitti consueverunt, Demetrius questus est de Lacedæmoniis, quasi spretus, quod unum duntaxat Legatum ad se misissent, cui Spartanus, annon satis, si ad unum unus? Ad Alexandrum missi à nonnullis gentibus Legati centum, à Sambastis gente Indica quinquaginta, à Scythiis viginti, ab Amphycitionibus Græciæ nomine viginti, Tigranes solitus adiri numerosis Legationibus, despecta paucitate militum Luculli, si, inquit, Legati, multi sunt; si hostes oppido paucissimi. Semper autem apud omnes gentes mos obtinuit, ut inter plures Legatos, unus legationis Princeps constitueretur, ita in legatione Philippi Regis ad Annibalem, Xenophanes, Ætolorum ad Romanos Phaneas, Romanorum in Græciam, & Macedoniam Appius Claudius. Ejus officium erat publicè mandata exponere, responsa accipere, & quicquid circa negotia mandata dicendum erat aliorum consilio, & consensu dicere. Legatis accedunt Comites & familia; Comites sunt honestioris conditionis personarum, quas Legatus ipse asciscit, ut à Scipione Æmyliano ad Reges adeundos à senatu misso, amicus Lælius, & Panætius philosophus; aliquando ab eo qui legationem mittit commendantur, ut ab Adriano secundo Pontifice Legatis suis comes additus Anastasius homo literatus Bibliothecæ præpositus; aliquando, ii Comites adhibentur, qui ad conciliandam gratiam, apud eum cui legatio destinatur, idonei censentur, ut Armenii & Chaldæi, ei legato quem Cyrus misit ad Indorum regem, In familia sunt liberi, & servi quorum ministerium legatis necessarium, aut utile.

4. Legatorum

4 Legatorum autoritas pendet à literis Commendatitiis & Mandatis, Literæ commendatitiæ, quæ vulgo Credētia, sive Fidei dicuntur quibus legationum authores testantur, iis ad quos legationes destinantur, legales à se missos, & quod legatorum nomine egerint, se ratum habituros Mandatum est de negotio gerendo voluntatis ejus qui legationem mittit expositio, estque vel apertum, quod ita præscribitur, ut si opus est, ad dubitationem tollendam, apud eos quibus legatio missa est, proferri potest, eoq; potestas vel addefinitū aliquod negotium concessa, vel libera potestas permessa, ut legatus quod reipublicæ expedire videbitur, agere possit, ita olim Phæneas, & Damocles ab Ætolis ad Romanos missi, ea potestate, ut quod ad bonum Publicum faceret, de eo bona fide liberè statuerent, ita Carolus Dux Burgundiæ, uti refert Cominæus, legatis suis liberam potestatem fecit, subscriptione nominis chartæ vacuæ, ut quid e re videretur, agerent, & inscriptione autoritatis suæ, si opus esset apud Ludovicum undecimum Galliæ Regem, confirmatam ostenderent: Mandata arcana sunt quibus modus & fines tractandi secretò legatis præscribuntur, quandoque quibus aliud quam quod in publicis mandatis continetur, præcipitur, ita à Senatu Romano legati alio prætextu missi, occultè ad dissipandum corpus Achæorum in mandatis habuerunt, talia in Pugillaribus exarata, & obsignata Gordianus senior misit Vitaliano, iisque similia fuere quæ Hamilicar, cum classe in Siciliam navigaret, signata dedit navium gubernatoribus, addito ne quis legeret, nisi vi tempestatis a cursu navis prætoris, abductus fuerit, His similia, Caius Marius Consul bello Cimbrico, & Teutonico excogitavit cum ad excutiendam Gallorum, & Ligurum fidem, literas eis misit, quarum pars prior iis præcipiebat, ne posteriores, quæ præsignatæ erant, ante certum tempus aperirent, easdemque postea ante prestitutum tempus repetens, quia reſaratas reperit, hostilia agitari intellexit. Atque hujusmodi sunt quæ legationes constituunt.

5 Jus Legationis est, quod Legatis, ab iis ad quos missi sunt præstandū est veluti, in eorum Receptione, Audientia, Dimissione & Securitate exhibenda. In Receptione Legatorum, qui à potentiioribus accedunt observari solitum, ut officii, vel honoris causa, etiam illustres personæ iis obviam procedant, ita Tiberio Legato Romano ipse Antiochus obviam ivit, Cum Justinus Imperator, quod ager ef-

fet Regis Persarum Legato occurrere non posset, Imperatrix ei obviam processit, & traditas ab eo literas recepit, & Carolus Magnus personas illustres misit, qui Aaronis Persarum Regis Legatos exciperent, ut primum Persarum terram tangerent, hujusmodi honor à plebique Regibus habetur Romani Pontificis Legatis, ut ipsi venientibus procedant, Rex autem Galliarum mittere solet fratrem, aut Principem aliquem consanguineum, qui hoc munere fungatur. Secundo ad receptionem Legatorum pertinet, ut pro dignitate hospitium paratur, & iis necessaria præbeantur. Romæ cum in libertate erat, exterarum gentium Legatis Quæstor obviam mitti solebat, quod eis donec manebant, ex publico arario sumptus decernebantur, hoc more Lucius Manlius Quæstor Masgabar, Legato Massanissæ, alius Quæstor Malicani Massinissæ, filio obviam processit, Quod in receptione Prusiarum, & Ptolomæi Regum, qui quasi Legati Romam venerunt plenius declaratur, Quippe Senatus cum Prusiam Bithiniam Regem, Perseo devicto ad gratulandum sibi venire audisset, P. Cornelium Scipionem Quæstorem obviam illi Capuam usque misit, censuitque, ut domus ei Romæ quam optima conductoreretur, & rerum copia, non solum ipsi, sed etiam Comitibus ejus præberentur, Et cum Ptolomæus Rex Ægypti à minori fratre regno spoliatus, petendi auxilii causâ cum paucis servis, squalore obfusus, Romam venisset, ac se in Hospitium Alexandrini Pictoris contulisset, id postquam Senatui relatum est, accersito juvene, qua potnit accurata excusatione usus est, quod nec Quæstorem illi more majorum obviam misisset, nec publico eum Hospito excepisset, eaque non sua negligentia, sed ipsius subito, & clandestino adventu contigisse dixit, Illumque è Curia protenus ad publicos penates deduxit, hortatusque est ut depositis sordibus, adeundi Senatum diem peteret, quin etiam curæ habuit, ut munera ei per Quæstorem quotidie darentur. Secundo moris est ut petentibus Legatis, Concilium, seu Audientia dies & locus certus, pro Personarum, & negotiorum conditione constituitur, Postquâ Romanorum Legati ab Achæorum gente diuturna expectatione delusi fuissent, Senatus eos admonuit, ne postea excusatione, qua se tegebant, uterentur, ut Legatis Romanis adeundi concilium, potestas semper fieret, quemadmodum & illis quoties vellent Senatus daretur. Legationibus Provincialibus audiendis Romæ, ne qui longius venirent, diutius tenerentur, à Calendis Februarii

bruarii, ad Calendas Martii Senatus aperiebatur, Principe Augusto, tribus Consulibus mandatum, ut has Legationes audirent, Tiberius ipse eas audiebat, iis adhibitis qui illis Provinciis præfuisent, Ita etiam Trajanus, de quo Plinius, adeunt statim, dimittuntur statim tandemque Principis fores, exclusa Legationum turba, non obsidentur. Legatis cum audiebantur, in consilio permissum suæ gentis lingua loqui, & interpretis ministerio uti, ita Cicero, Neq; Pœni, neq; Hispani ullavè gentes externæ, in Senatu Romano sine interprete loquebantur, Tribus Philosophis Atheniensium Legatis, Cæcilius Senator interpres datus. Tertio Legatis etiam debetur, ut Legationi exposita, responsio detur. Aristhenus Achæorum Prætor, cum Principes ejus gentis auditis Romanorum, Attali, Philippi Regis, & Rhodiorum Legationibus, de eorum postulatis, potestate per Præconem ex more facta consulere nollent, Non magis, inquit, Consilium vobis Principes Achæorum, quam lingua deest, sed suo quisque periculo, in commune consulere renuit. Forsitan, Ego quoque tacerem, si privatus essem, nunc Prætor, sentio, aut non dandum Consilium Legatis fuisse, aut inde sine responso eos dimittendos non esse. Ego autem respondere nisi ex decreto vestro nequaquam possum. Aliquando vero responsum, non iis qui Legatione functi sunt, sed Per Legatos proprios transmittitur, ita Alexander Legatis Darii, ad se cum literis missis, & orantibus uti Matrem, uxorem, liberos dimitteret, responsum viva voce non dedit, sed Therispum una cum literis ad Darium, cum Epistola qua ad literas Regis, & Legatorum postulata respondit, ire iussit. Responsi dilatio potentioribus pro contemptu habetur, Itaq; cum Antiochus populi Romani Legatos, manu excipere veller, Popilius literas à Senatu ipsi perlegendas dedit, quibus perlectis, cū se, adhibitis amicis, consulturum dixisset, Popilius, pro asperitate animi, virga qua manu gerebat, circumscriptis Regem, dixitque priusquam hoc circulo excedas, redde responsum Senatui, quod referam, quo violento imperio, obstupescens Rex, Faciam, inquit, quod Senatus censet. Excusatus fuit. Legati Perusini commentum, quo ab Urbano quinto Pontifice, subito responsum elicit, Quippe cum Legationis Princeps prælonga oratione in expositione negotii Pontifici laboranti, tadium intulisset, isque inquireret, numquid aliud in mandatis haberent, exorsus alter dixit, Sanctissime pater, mandatum nobis est, ut nisi quamprimum

munus responsum accipiamus. Collega hic noster longè prolixiori oratione apud Sanctitatem vestram verba faciat. Quo audito sine mora, Pontifex responso dato Legatos dimisit.

Postremo Legatis securitas, ab iis ad quos missi sunt præstanda est, quamdiu in eorum Territoriis existunt, quia personas eorum sustinent, qui Majestatem habent, Nec solum Legatis, sed et comitibus, familia, & rebus eorum securitas debetur, quoniam, comites & familia Legationis pars sunt, & vasa & bona Legati mobilia, personæ accessio habenda sunt.

3. Tertio inter diversos Principes, vel populos debitum est, Jus Conventionis civilis, ex quo sicut privati, de re aliqua particulari contrahentes, obligantur, utpote cum Principes de sponsalibus, vel matrimonio ineundo inter se conveniunt, quod aliquando per Procuratores, vel Legatos speciales expediunt, idque, uti Bodinus observat, frequentius Principes masculi, qui Picturis credunt, quam feminæ sui juris, quæ viros spirantes contueri, & præsentem alloqui malunt, ita enim Isabella, Castellæ Regina, Ferdinando nubere noluit, priusquam os Principis aspexisset, nec uti idem Bodinus refert, Elizabetha Anglorum regina, unquam adduci potuit, ut cuiquam connubium promitteret, quem præsentem non videret, quare Henrico Regi Suecorum, diuturna Johannis fratris Legatione, eam ad nuptias petenti, responsum, Se Regi plurimum debere, quod ipsam è carceribus ad regnum deposcisset, id tamen apud se decretum fuisse, ut Principi nemini nuberet, nisi quem antea videre liceret. Itè cum Principes de Dote, vel de Juribus quæ ratione matrimonii competitura sunt, paciscuntur. Ita inter Philippum Regem Hispaniæ, & Mariam Reginam Angliæ pactum erat, ut contractis nuptiis, Philippus uxoris regnorum, & Provinciarum titulos sibi sumeret, sociusque in eorum administratione esset integris regni Privilegiis, & consuetudinibus, plena item, ac libera gratiarum, beneficiorum, ac functionum distributione penes ipsam remanente. Vicissim ut Regina in societatem omnium regnorum, Philippi mariti vocaretur, & si Philippo superstes esset, Dotis nomine, annua pensio, sexaginta mille librarum, ei penderetur, Præterea ut liberi qui in hoc matrimonio nascerentur, in omnia regna, ac dominia Reginæ, & in omnes Belgii, & Burgundiæ, quos Cæsar possidebat Principatus succederent, Carolus vero Philippi ex priori uxore filius, cetera omnia

in

In Italia, & Hispania regna obtineret. Item cum Principes ex aliis causis ad pecunias persolvēdas, ad urbes, arces, aut res alias reddendum, se astringunt. Quemadmodum cum Franciscus Rex Galliarum ditiones, quas captivus promiserat, ordinibus regni reclamantibus Hispano cedere non posset, postea pace Cameracensi conventum est, ut Cæsar Galli liberos in Hispania obsides liberaret, & Gallus Cæsari vicies centena millia aureorum, Lytri nomine dependeret, & præterea quindecim millibus, Henrico octavo Regi Angliæ, quæ Philippus Cæsaris pater, ab Henrico septimo ventis adversis in Angliam delatus mutua sumpserat, exolutis, Liliū aureum gemmis insignitum, cui etiam frustum Dominicæ crucis inclusum credebatur, eo nomine oppignoratū, redimeret, & Cæsari restituendum curaret. Ita cum anno 1585. inter Elizabetham Angliæ Reginam, & Ordines confœderatos Belgicæ conventum esset, ut Regina fœderatis provinciis quinque millia peditum, & mille Equites suppeditaret, & iisdem durante bello stipendia solveret, & interim Fleissinga, Arx Ramekana, & insula Briela cum oppido, & propugnaculis, pro cautione in manus Reginæ traderentur, Jacobus Rex Angliæ pecunia debita, sexcentum scilicet mille librarum, exoluta, oppida, arcem & insulam, cum propugnaculis, post triginta annos ordinibus Belgicæ restituit. Atque huiusmodi Conventiones, successores, quando propter utilitatem publicam initæ sunt, de iure, alias ex honestate, præstare tenentur, ita Franciscus secundus, Rex Galliarum, ad Helvetios patris debita reposcentes, scripsit. Tametsi paternam debitam solvere non teneretur, cum Sceptrum Galliarum, non hæreditario iure haberet, sed Lege & consuetudine regni, quæ non aliter ipsum obligat, quam ad ea fœdera, pactave observanda, quæ cum exteris principibus, ac populis ad regni utilitates, & commoda, à maioribus contracta sunt, nihilominus se, ut patris charissimi fidem religiose tueretur, legitimam ejus debitam solvere decrevisse.

4. Quarto Jus Fœderis, est quo principes, vel populi ad aliquid generalius, cum majori solennitate obligantur, nam Fœdus, uti docet Livius, in genere, est contractus qui jussu summæ potestatis populum universum obligat, in specie, Inter eos quibuscum Pax est, (uti Menippus apud eundem Livium) Cum qui Hostes nunquam fuerunt, ad amicitiam, sociali fœdere inter se conjungendam coeunt, & apud Romanos per Fœciales, addito Patrepatrato, peragi solebat,

solebat, ejusque objectum, est aliquid magis generale, & continu-
um, quam aliterius publicæ conventionis, utpote Amicitia, vel Socie-
tas, vel aliquid quod ab amicitia, vel societate dependet, ut Commer-
ciū, vel Auxilium. Nam etsi inter aliquos ex relatione personali, vel
re ali, Amicitia, vel Societas existat, eadē arctiori fœderis, vel solen-
nis contractus vinculo confirmari, & cum aliis, quibuscum antea
non intercesserunt, stabiliri, & utriusque, modi & conditiones præsi-
niri consueverunt, & Auxilia quæ ex fœdere Societatis debentur,
certius & melius, quam quæ ex alia Societate competunt, determi-
nantur. Etenim Fœdera alia circa societatem, & auxilia ad defensi-
onem pertinent, quæ *ἐμπάχεια*, dicuntur, alia ad defensionem, & of-
fensionem spectant quæ *συμπαχεια*, appellantur. Deinde quod ad
Modos, vel conditiones attinet, Fœdera, aut æqualia sunt, cum Prin-
cipes, vel populi ad paria obligantur, aut inæqualia, cum alter plus,
alter minus præstare tenetur. Qui ex æquo fœdere conjunguntur,
sux Majestatis dignitatem nulla parte diminutam retinent, qui in-
æquali fœderi subjiciuntur, aliquando alter alterum superiorem
agnoscere, ejusque Majestatem comiter observare debet. Ita cum
Ætolis sociale fœdus his verbis percussum est, Imperium, Majesta-
temque populi Romani Gens Ætolorum conservato, sine dolo ma-
lo, eosdem hostes, quos populus Romanus habeto, armaque in eos
fereto, & bella pariter gerito.

5. Hujusmodi Conventionibus publicis, & Fœderibus aliquan-
do Fides interponitur, aliquando jusjurandum solenne adhibetur,
Apud Persas firmissimum fidei vinculum, datis dextris, habebatur,
cujus etiam usus fuisse videtur apud Romanos, unde Cicero in O-
ratione pro Deiotaro dixit, Caii Cæsaris dextram non in bellis & in
præliis, quam in promissis & fide firmiorem. Jusjurandum est, cum
Deus testis, & vindex invocatur, cujus religio suprema fuit, & ab
omni ævo, apud omnes populos circa pollicitationes, promissa, &
contractus, maximi ponderis, ita Cicero, Majores nostri nullum vin-
culum, ad astringendam fidem jurejurando arctius esse voluerunt.

Vid 1 *Paschalium* c. 35 38 39 *Comminei* *Comment. Besoldum* ac *Jejone* & *præce-*
dentia, *Nolden*. de *Nobilitate* cap. 1. nu 6. *Lanquet Epistol* 53 *Arma Suevica* pag.
36 39. 2 *Conradum Brunum*, *Albertum Gentile* *Kirchnerum Besoldum de Le-*
gationibus, & qui ab eis recensentur. 3 *Eodinum* lib 6 nu 744 *Conradum Bru-*
num, lib 3 cap 14 *Bodin* lib. 1. cap. 8 no. 91 cap 9. nu. 105 *Godwint annales* anno
1585. 4 *Bodin* lib. 5 cap 6, *Ayralam*, lib. 1 cap 7, *Lupum de Confederationi-*
bus, *Sigonium de antiquo jure Italia* cap. 1 *Grotium* lib. 2 cap. 15. 5 *Grotium*
lib. 3 cap. 13, *Bodin* lib 5 cap 6.

SECT. V.

SECT. V.

De Delicto inter eos quibuscum Pax est.

Delictum est inter eos quibuscum Pax est: cum Personis injuria infertur, vel Bona invaduntur, aut auferuntur, & cum quæ de Jure, vel ex conventionem aut fœdere debentur, non præstantur.

Delictum inter Principes, vel Populos diversos est, ex quo Communio, vel pax læditur, unde sicut inter privatos ex delictis, & injuriis lites forenses, ita inter eos qui Judicem non habent, bella oriuntur. In his delictis primum est cum status læditur, vel personis injuria infertur, itaque Germanicus à Pisone Syriæ Proconsule contumelia affectus, & Amicitiam renunciavit; & Philippo facinus indignum videbatur, cum Athenienses ejus statuas urina perfuderunt; quemadmodum Romanis factum audacia plenum, cum Ephesii eorum statuas dejicerent. Idem habetur cum personis conjunctis injuria infertur, itaque Agamemnon, & reliqui Græciæ Principes ob dedecus raptus Helenes, Menelai uxoris, Trojanis bellum intulerunt. Deinde ad injuriam etiam refertur, si quod pro humanitate, aut amicitia præmittendum est denegetur, & transitus per territorium, vel commercium, ita Augustinus affirmat, quod justæ bella gerebantur, à filiis Israel contra Emoræum, quia innoxius transitus iis denegabatur; & Græci probabant querelam Megarensium contra Athenienses, qui eos arcebant suis portubus, contra jus commune, ut Plutarchus loquitur: sed & ad injuriam pertinet, si vel focii vis illata sit, vel Hostibus auxilium suppeditetur, ita Quintius ad Nabidem Lacedæmoniorum tyrannum, vos, inquit, vestramque Amicitiam ac Societatem populi Romani non violavi, Quibus igitur rebus Amicitia violatur? nempe his maxime duabus, si socios meos pro hostibus habeas, & si cum Hostibus te jungas.

2. Secundo inter diversos Principes vel Populos delinquitur, cum Bona auferuntur, vel regiones, aut territoria occupantur, ita Plateenses apud Thucididem, aiunt, Communis omnium mortalium Lex est, ulcisci eos qui nostra deprædantur. Itaque Romani Ligures Latrocinii infestos bello prosequuti sunt. donec Posthumi-

us ita eos exarmasset, ut vix reliquerit ferrum quo terra coleretur; tum vero injuriæ grandiores sunt, cum ditiones aut regna invaduntur, ita Jephtha tuendorum finium causâ adversus Ammonitas bellum gessit, & Belli Asiatici occasio traditur, cum ex Testamento Attali Romani provinciam occupassent quam Aristonicus regii sanguinis juvenis sibi deberi ratus, armis vindicabat.

3 Tertio, Delictum est in Pace cum contra Jus Colloquii, vel Legationis quid admittitur, vel quod ex Conventione, vel fœdere civili, non observatur, 1. Ad Jus Colloquii spectat, cum quis occasione congressus, vel colloquii laeditur, vel decipitur, ut cum Cornelius Asina Consul Romanus simulato colloquio ad Carthaginensium Ducem evocatus, oppressus fuit, perfidiz Punicæ, inquit Florus, documentum; Et cum Johannes Dux Burgundiz, Carolo septimo Galliz Regi in colloquutione veniens, a nonnullis familiaribus Aureliani Ducis, magnæ apud Carolum autoritatis, interfectus est, quæ cades, inquit Cominæus, postea maximarum calamitatum causa fuit. 2. Circa Jus Legationis pro delicto est, si Legati non admittantur, ita cum Annibal Saguntum obsideret & à Roma Legatos venisse nuntiatum est, ipsis obviam ad mare misit qui dicerent, Nec tuto eos adituros inter tot gentium arma, nec sibi in tanto discrimine operæ esse Legationes audire. Qua occasione aride arrepta Hanno in Senatu Carthaginensi acerrimè in eum invehit, Legatos, inquit, ab sociis & pro sociis missos, bonus Imperator vester in castra non admisit, Jus gentium sustulit, Hi tamen, unde ne Hostium Legati arcentur, pulsi ad vos veniunt. Simile factum Persei, Senatus accepit pro denuntiatione belli, cum Legatis Romanis in Ætolium & Macedoniam missis, alii abesse eum, alii agrum esse, falso utrumque fingerent, ipsique sibi regem conveniendi potestatem factam non fuisse renuntiaverunt. 2. Si legati ludibrio habiti sint, ut cum Legati, quos David ad Ammonem Ammonitarum Regem, post mortem patris ad consolandum eum miserat, barbæ dimidio abraße, & vestibus usque ad nates abscissis, dimissi sunt, ob quod David ipsum & Ammonitas gravi bello prosequutus est. Cum Marius Acilius Legatus Romanus à Mithridate captus, & ludibrio expositus est; cum Corinthii in eorundem Legatos praterreunt sordes effuderunt. 3. Cum ab inferioribus, vel æqualibus superba responsa redduntur, ita Gracchus Aquilius, Aquorum Imperator

perator, cum Legati à Romanis venissent, questum injurias, & res ex fœdere repetitum, jussit quæ mandata haberent à Senatu Romano, ad quercum dicere, se interim alia acturum. Cujusmodi responsum Caio Fannio Legato Romano datum, belli Dalmatici, quod Scipio confecit, causa fuit, Nam cum is venisset ex postulatam eadem Legatorum Gentium conterminarum, Legati sermonem non admiserunt, pratendentes nihil sibi cum Romanis commune esse & Si Legatis verbera inferantur, Nam si quis Legatum pulsasset, id contra Jus gentium commissum existimatum est, inquit Jureconsultus, Itaque cum Laurentium Legati à Regis Tatii propinquis pulsati essent nec ipse vindicasset, in ipsum crimen vertebatur. § Multo gravius delictum habet si Legati morte afficiantur, Itaque cum Tolumnius, quo auctore Legati Romani à Fidenatibus intercepti fuerant, à Cornelio Cossio in prælio victus fuerat, Cossus in ipsum sic invehebatur; Hiccine est raptor fœderis humani, violatorque gentium juris, jam ego hanc maculatam victimam, si modo sancti quicquam in terris Dii esse volunt, Legatorum manibus dabo. Et Leptines qui Legatum Romanum interfecerat, à Demetrio Romam missus est una cum Isocrate Grammatico qui cadis ejus suavor fuerat. Cum Senatus ad Gallos Senones Legatos misisset questum quid ita cum sint focii populi Romani, hostibus Romani nominis militarent, Britomaris Celta, memor patrem suum, cum inter auxilia Romana militaret, casum fuisse, Legatos frustratim conscidit, & frustra per campos disseminari fecit, Quod postea flagitium à Romanis multa severitate in Gallos vindicatum. Sed & Legati aliquando, contra eos, ad quos missi sunt, delinquant, utpote, cum insolentius quam par est, se gerunt, ita Lucius Amius Stetinius, à Latinis Legatus Romanam missus, in Senatu Romano loquebatur, tanquam si victor armis Capitolium cepisset, non ut Legatus jure gentium tutus, ob quam causam Senatus adversus Latinos bellum decrevit, & cum Cæsari à Tigurinis, & Helvetiis Legatio missa fuisset, ad explorandum num in Pacis condiciones conveniri posset, Cæsarque iis Obfides, & pecunias imperasset, illi responderunt, sui moris esse alia accipere, non dare, cujus insolentia Cæsar impatiens, statim adversus Tigurinos Labienum misit, ipse in Helvetios movit. 2 cum impudicè, & contra jus hospitii aliquid admittunt, ut Legati, qui à Magabazo Persa, ad Amyntam Regem Macedonia, Re ad quam venerant

impetrata, regio convivio, multa cum humanitate excepti sunt, sed ubi per vinum, & Epulas incaluerunt, multa procacitate, & impudica luxûs via erga fœminas regias usi sunt, quod cû indignè ferret Amyntæ filius, cum juvenes aliquot gladiis cinctos fœmineis vestibus ornatas in eorum locum suffecisset, Legatos eadem lascivia eosdem tractantes, gladiis districtis interfici sunt. 3. Cum aliquid in perniciem eorum ad quos missi sunt Legati moliantur, itaque Pelopidas, cum Thessaliam in potestatem Thebanorum redigere conaretur, Legationisque jure se tutum arbitraretur, quod apud omnes gentes sanctum esse consueffet, ab Alexandro Pherzo, simul cum Ismenia comprehensus, in vincula conjectus est; & cum Attila Rex Scythiz, multis conjecturis deprehendisset, Bigilam Maximini Legati interpretem, eo consilio adhibitum, ut ipsum trucidaret, Bigilæ filium, qui in eam Legationem cum patre venerat, gladio transfigi iussit, ni Pater statim proditoris consilium fateretur, unde is nihil cunctatus omnia quæ meditata erant aperuit, orabatque dimisso filio, in se ferrum verti, itaque in vincula conjectus est, donec misso ad hoc filio, magna pecuniæ summa ad expiandum facinus, & ad redimendam libertatem persolveretur.

4. Quarto Circa conventionem civilem Delictum habetur, cum id de quo inter Principes, vel populos convenit, non præstatur. Ut cum Gubernator, & Proceres Scotiæ solenniter promississent, Mariam Reginam infantulam Edvardo sexto Regi Angliæ, etiam impuberi, si cum ad maturam ætatem pervenirent, utraque consentiret, enupturam, & postea in gratiam Regis Galliæ, contra pactam fidem Delphino desponsassent, Protector Regis, & Proceres Angliæ indignè ferentes bellum Scotis moverunt, eosque magna clade affecerunt, multis millibus in acie interemptis, & præcipuis nobilium captis, inter quos Huntleius, cum interrogaretur, numquid jam probaret propositum Regis Edvardi cum Maria regina matrimonium, respondit, sibi quidem matrimonium illud non displicere, ambiendi vero modum nequaquam probare posse. Item contra conventionem fit, cum circa promissa, vel debita falso & dolose agitur, sicut cum Græci Phœnicibus naves aliquot deberent, naves, sine clavis, velis & remis tradiderunt. Cui non dissimili astutia Ducem Mediolani promissionem eluisse narrat Cominæus, cui cum Dux fateretur se pollicitum quidem Regi Galliæ naves aliquot subministrare, non tamen

ramen ut iis militem Gallicum imponeret, respondit, hanc excusationem esse, ut si quis mulam alicui commodato daret, ut transiret Alpes, atque interim juberet, ut pedes illam deduceret, neque alium ejus usum concederet. Nec tamen est de quo querantur decepti, qui in re gravi, ac seria, responso levi aut dubio credant, Quomodo se, & Dominum suum delusit Legatus Gallicanus, qui cum post mortem Francisci Sfortia Ducatum Mediolanensem, Regis sui nomine, à Carolo quinto Imperatore, petiisset, Respondit Imperator, sibi idem placere quod fratri suo, Regi Gallia, quibus verbis Legatus Carolum assensum præbuisse ratus, de eo Regem statim certiorum fecit, cum Carolus eo animo dixerit, quod Ducatus Mediolanensis, sibi non minus, quam Gallo placeret, nec minori studio à se retinendum, quam à Gallo expetitur duceret. Denique in Pace & delictum est, cum contra Fœdus civile aliquid commissum est, ut cum Carya civitas Peloponnesi, libertatem patriæ, & sacrorum fœderum immemor, Persis hostibus contra Græciam faveret, Græci parta victoria, communi consensu Caryatibus bellum intulerunt, & viris interfectis, deleta Civitate, matronas in servitutem abduxerunt. Et cum Albani, Fidenati bello, ex fœdere in auxilium missi, inter duos medii expectare fortunam, Tullus Hostilius qui prodicionis fraudem irritâ fecerat, hoste victo Metium suffocatum raptorem fœderis inter duos currus religatum, pernicibus equis distraxit. Ita etiam Iliturga civitas Hispaniæ, Romanorum antea amica, quod reliquas exercitus Scipionis, eo, ut ad amicos fugientes Panis prodidisset, à Scipione filio expugnata, deletur funditus, caesis & mulieribus, & parvulis.

5 Denique in his delinquendi gravius est periculum, ubi Fides violatur, aut Jurisjurandi Religio contemnitur, nam Grave est fidem fallere, quæ justitiæ totius firmamentum est, qua non solum respublica, sed omnis humana societas continetur, & quod Perjurium Atheismo sit detestabilius, cum perjuri Numen agnoscere videantur, sed ipsum irridere audeant.

Vid. 1. Bodinum lib. 5. cap. 6. Gentile lib. 1. cap. 13. & seq. Grotium lib. 2. c. 1. §. 1. 2. Florum lib. 2. cap. 3. & cap. 20. 3. Comineum Comment. lib. 4. Brunum, Paschalium, Belsaidum de Legationibus. 4. I. ayveardum in vita Edwardi sexti. Gentilem l. 2. c. 4. Cominum de bello Neapol. lib. 4. Erodium decret. de Legat. & ad l. iul. Majestatis Bodinum lib. 5. cap. 6. 5. Grotium lib. 2. cap. 13. Bodinum lib. 5. cap. 6.

SECT. VI.

De Jure Belli.

Bellum est inter diversos Principes, vel populos, juxta Contentio, estque vel solenne, quod Indictum publicè geritur, vel minus solenne, & Represalia, quæ à privatis exercentur. Jus etiam Belli statum, Dominium, Debitum & Delictum inter eos quibuscum Bellum est respicit.

Sicuti Pax, ita Bellum jure Gentium continetur. Estque Bellum juxta Contentio, quæ scilicet autoritate legitima, & ex justa causa movetur. Legitima autoritas est suprema, ita Augustinus, Ordo inquit naturalis poscit, ut suscipiendi belli autoritas sit penes Principes. Justa causa est Injuria, quam & vindicare licet, & repellere, unde Bellum aliud Offensionis, aliud Defensionis dicitur, quemadmodum Camillus in denuntiatione ad Gallos. Omnia, inquit, quæ defendi, repetique, & ulcisci fas sit. Deinde bellum solenne est, vel minus solenne; solenne quod rite indictum, publicè geritur. De Indictione Cicero Officiorum primo, Belli, inquit, aequitas sanctissimè populi Romani Fœciali jure præscripta est, ex quo intelligi datur nullum bellum esse justum, nisi quod aut rebus repetitis geritur, aut ante denuntiatur, & indictum. Indictionis formulam ita tradit Livius, Tribus Romanis puberibus præsentibus, sic dicebat Fœcialis, quod Populus præscorum Latinorum, adversus Populum Romanum, fecerunt, deliquerunt, quod populus Romanus Quiritium censuit, consensit, consuevit ut bellum cum præscis Latinis fieret, ob eam rem Ego, populusque Romanus, populis præscorum Latinorum bellum indico, facio, quod ubi dixisset, hastam in Hostium fines emittebat, Bellum publicè geritur, cum publica sunt arma, & omnes belli periculis sunt obnoxii.

2 Bellum minus solenne est, quod à privatis suscipitur, cujusmodi belli apud antiquos duæ erant species, *Ἀνδραπορία* & *Εὐρυζέλευς*. *Ἀνδραπορία* sive Prehensio hominum, erat, de qua Lex Attica, si quis morte per vim illata objerit, pro eo proximis, ac necessariis jus est hominesprehendendi, donec aut pœna sumatur de eade, aut homicida

micida dedantur, liceat autem tres homines prehendere, & non ultra, quod secundum Julium Pollucem intelligendum, cum Homicida ad aliquos confugiunt, & postulantibus non traduntur; simile huic est, quod ad recuperandum Civem injuria manifesta captum, cives Civitatis apud quam id factum est, retinentur, Et proinde Carthaginenses quidam, impediunt ne Ariston Tyrius caperetur, ne Tyrus, & in aliis Emporiis in quæ Carthaginenses frequenter commendant, isdem, idem eveniret. *Ενυκεσις* sive Pignoratio est, cum inter diversos Principes, vel populos ob justitiam denegatam res auctoritate publica capiendi, privatis jus conceditur, quod vulgo Repressalia dicuntur. Justitia vero denegata habetur, non solum si in fontem, vel debitorem, intra tempus idoneum judicium obtineri nequeat, verum etiam si in re minime dubia, planè contra jus judicatum sit, cum auctoritas judicantis, non idem in exteros, quod in subditos valeat. Hujus juris vetustum exemplum est apud Homerum, ubi Nestor narratur, ob ereptos patri Equos, Elidentium pecora, & armenta cepisse; & in historia Romana, de Romanorum navibus, quas pro bonis Tarquiniorum, Aristodemus Tarquiniorum hæres, Cumis retinuit.

Vid. 1. *Myalam & Gentilem de jure belli. Petri Fellum de re militari. Grotium lib. 1. cap. 1. §. 2. cap. 22. 23. Gentilem lib. 3. Grotium lib. 3. cap. 8. 2. Bartolum, Laudensem, Dalnerum Johannem à Canibus de Repressaliis Grotium lib. 3. cap. 2. §. 2. 3. 4. &c.*

S E C T: VII.

De Statu inter eos quibuscum Bellum est.

Status inter eos quibuscum Bellum est, est Conditio inter ipsos, quæ ad Imperium militare refertur, quod est Dominationis, Præpotentia & Patrocinii militaris, vel Conditio cum aliis ex qua alii Inimici, alii Hostes habentur.

AD Communione inter gentes spectat, non solum Regimen, vel Imperium Civile cui sponte, & ultro populi se subiciunt, sed etiam Militare, quod vi, & armis, & virium, & armorum intuitu comparatur, quale est primum Imperium Dominationis, qua

qua populi, & gentes per victoriam in servitutem redactæ sunt, quale fuit primum Imperium Asiaticum, quod Aristoteles qui Asiæ populos pro Barbaris habuit, Barbaricum vocat, ἀρχὴ δουρικύβητος regimen herile, cui Asiæ incolæ pro moribus innatis libentius quam Græci, & Europæi se submitunt. Ejus initium ad Ninum refertur. De quo Justinus, Temporibus, inquit, Antiquioribus, Reges longinqua, non finitima bella gerebant, nec Imperium sibi, sed populis gloriam quærebant. Primus omnium Ninus Rex Assyriorum, veterem, & quasi avitum gentium morem nova imperii cupiditate mutavit, Hic primus intulit bella finitimis, & rudes adhuc, ad resistendum populos ad Lybiæ terminos usque perdomuit, Is magnitudinem quæsitæ Dominationis, continua possessione firmavit, & cum accessione virium; fortior ad alios transiret, proxima quæque victoria instrumentum sequentis erat, donec totius Orientis populos subegit. Hic in sacris Literis Nimrodus, id est Dominus metuendus dicitur, & potentissimus venator, id est Latro insignitur, quia homines liberos in servitutem redegit. Postquam Cyrus ab Assyriis & Medis totius Asiæ monarchiam ad Persas transtulit multum de jure Dominationis remissum est. Ille enim Assyrios devictos bono animo esse jubebat eandem ipsorum sortem fore quæ fuisset, mutato tantum Rege, mansuras ipsi Domos, agros, jus in uxores, in liberos ut fuisset hætenus, Leges etiam sub hoc Imperio promulgatæ sunt, quibus ut populi, ita & Principes tenerentur. In magna vero veneratione Reges habebantur, ita Plutarchus narrat, quod cum Themistocles Regem Persarum Græco more convenire vellet, Artabanus Præfectus Prætorio, illum ab aditu repulit, neque alloqui passus est, nisi prius adorato Rege, deinde Prætorio egressum humanitèr alloquutus est, factumque ita excusavit Laudabile est Themistocles, suum cuique gentis institutum, vos Græci libertatem & æqualitatem amplexati consuevistis, Nos vero nihil tam naturæ consentaneum, nihil tam decorum ducimus, quam Regis nostri Majestatem, ut Dei Optimi maximi in terris imaginem adorare, & revereri.

2 Imperium Præpotentiæ est, quo populi devicti sub fortioris potestate, & in obedientia ei continentur, ut ne damno sint, & commodis ejus inserviant, cujusmodi Imperium à Græcis, & Romanis usurpatum est, ita Isocrates ad Philippum, Barbari hætenus domandi sunt, quantum satis erit ut tuam regionem in tuto colles, Lacedæmoni

Lacedæmonii in initio, & Athenienses, in captas Civitates nullum sibi vindicabant imperium, tantum volebant eas regimine uti ad suam accommodato; Lacedæmonii, sub Principum potentia, Athenienses sub populi arbitrio. Agésilæus, uti narrat Xenophon, quasunque Civitates in potestatem suam redigebat, eas immunes habens ab iis quæ servi Dominis præstant, ea tantum imperabat, in quibus homines Rectoribus parent. Dario victo Alexander hanc conditionem aliquoties offerebat, ut ipse imperaret aliis, pateret Alexandro. De Romanis Salustius, Majores nostri Religiosissimi mortales nihil victis eripiebant præter injuriæ licentiam; & alibi, Populo Romano melius visum amicos quam servos quærere, tutiusque rati volentibus, quam coactis imperitare. Itaque Quintius Atolis dicentibus Pacem firmam esse non posse, nisi Philippus Macedo regno pelleretur, dixit, sententiam eos dixisse, immemores Romanorum moris, victis parcendi: & addidit, Adversus victos maximum quemque mitissimum animum habere. Devictis regibus, eos imperium permisisse testatur Tacitus, qui ait Populi Romani Consuetudinem, ut haberet instrumenta servitutis, etiam Reges, à quo Antiochus appellatur, inservientium Regum ditissimus. Atque hæc fortassis ex gratia & pro arbitrio usurpata sunt. Ordinariè vero Senatus, literis devictoriâ ab Imperatore, qui bellum confecit, certior factus, Ipsi, & decem, aut quinque aliis, è Senatoribus delectis, de regione, & populo devictis, statuendi potestatem decreverunt. Hi pro meritis Civitates in Præfecturas, Regiones in Provincias ordinabant, Civitates quæ ingrata erga Populum Romanum fuissent, ac fidem semel datam, atque iterum sefellissent, ubi in potestatem, ditionemque essent adductæ in Præfecturæ formulam referebantur, de quibus Festus, in iis jus dicebatur, & nundinæ agebantur, & erat quædam earum republica, neque tamen magistratus suos habebant, & in quas Legibus Præfecti quotannis mittebantur, qui jus dicerent. Prima Præfectura erat Collatia jam inde à L. Tarquinio Prisco rege instituta, quam deditione facta in fidem venisse Livius ait non eadem æquitate, qua Crustuminos, Nomentanosque hostes, sed armis spoliata, ac pecuniis multata, Præfectum etiam cum præsidio accipere jussam. Regiones in Provinciæ formam redigebantur, cum Leges patriæ abrogatæ, vel novæ pro arbitrio introductæ essent, &

Prator quotannis à Senatu Romano præficeretur, penes quem reipublicæ Administratio, & Imperium, cū exercitu, si belli gerendi causa esset. Hoc modo in Provinciam redacta est primum Sicilia, deinde Sardinia, tertio citerior Gallia, tandem à Cæsare Gallia transalpina, & Britannia.

3. Imperium Patrocinii, sive Beneficentiæ est, quo qui à Principe Feuda, seu Beneficia militaria acceperunt ad Obsequium militare astringuntur. Cujusmodi est Imperium Longobardicum, à populis Germaniæ septentrionalibus, qui expulsis incolis, in ea Italiæ parte, quæ Gallia Cisalpina dicta est confederunt, introductum. Hi Imperatoris Germanici potestati se subicere noluerunt, sed liberè vivebant, suisque Legibus utebantur, quorum Principes Locis præcipuis, cum iis juribus, quæ Regalia dicuntur, in Dominio proprio retentis, Dignitates, & prædia Personis ad militiam idoneis ob fidelitatem, & servitia militaria concesserunt. Apud eos feudi, sive Beneficii author, Patronus, & Senior, qui feudum sive Beneficium acceperunt vassalli appellabantur. Et Feuda erant alia cum dignitate & Jurisdictione quæ Valvasores Majores obtinebant, utpote Ducatus, Marchionatus, & Comitatus: alia cum Jurisdictione tantum quæ Valvasores Minores; & citrà utrasque, Prædia simplicia, quæ valvasini possidebant. Horum institutum non dissimile erat ei, quod de Alexandro Severo Imperatore Romano Lampridius refert. Is enim Prædia quæ ab Hostibus capta erant, Limitaneis Ducibus & militibus concessit, ita ut eorum essent, si hæredes eorum militarent, dicens eos attentius militaturos, si & sua defenderent. Hanc consuetudinem Imperatores Germanici postquam Italiam receperunt non solum retinuerunt, sed ulterius extenderunt; Fredericus scilicet Conradus, & alii, qui cum animadverterent Magistratus in Oriente constitutos, alios Provinciarum dominium usurpassè; alios spe ampliorum opum, & dignitatum, cum hostibus Imperatorum collusisse, præter dignitatem, & administrationem, etiam utilitates earundem provinciarum Personis spectatæ virtutis, earumque hæredibus, sub similibus Fidelitatis & servitii militaris conditionibus concesserunt. Obsequii sive servitii militaris originem, aliqui à moribus Germanorum, à quibus Longobardi oriundi sunt, repetunt, de quibus Tacitus refert, eorum Principes amplò Comitatu studuisse, quem

quem ex bello aluerunt, ad bellum conduxerunt. Iis Principem suum defendere, tueri, sua quoque fortia facta ejus gloriæ assignare, præcipuum sacramentum erat, iis infame in omnem vitam, ac probrosum, Principi superstitis ex acie recessisse.

4. *Conditio Principum vel Populorum quibuscum Lis est vel Contentio cum aliis est, ex quâ alii Inimici, alii Hostes habentur. Inimici sunt quibuscum nulla est Amicitia, vel juris communio, veluti cum Exteris, & Adversariis, Exteri apud Græcos Barbari, apud Romanos Peregrini dicebantur, quibus si quid injuriæ, vel damni illatum, nullum juris remedium comperebat, ut quoad aliquos belli effectus, instar hostium viderentur. Ita Jureconsultus, Si cum gente aliqua neque Amicitiam, neque Hospitium, neque fœdus Amicitia causa habemus, hi Hostes quidem non sunt, quod autem ex nostro ad illos pervenit illorum fit, Idemque est, si ab illis ad nos aliquid perveniat. Sed hoc jure, inquit Bodinus, jam non utimur, ob eam quæ homini cum homine intercedit humanitatis rationem. Deinde Adversarii sunt, cum quibus Amicitia, vel juris communio quæ fuit dissoluta est, Civili scilicet dissentione, ita Cæsar Pompeianos, Adversarios frequentissimè appellat, de quibus etiam Jureconsultus, In Civilibus, inquit, dissentionibus, quamvis per eas Respublica lædatur, non tamen in exitium reipublicæ contenditur, qui in alterutras partes discedunt, inter hostes non sunt, inter quos jura Hostium fuerint.*

5. *Hostes propriè habentur, quos offendere, & perdere omnino licet, quorum alii deterioris, alii melioris conditionis sunt; Deterioris conditionis sunt, quibus jura Belli non conveniunt, quales sunt Perduelles & Prædones. Perduelles sunt qui adversus Principem suum, vel Rempublicam hostili animo armati sunt, quibus accedunt Rebelles, & Defectores, qui cum Principis alicujus imperio tenerentur, ab ipso desciverunt; Prædones sunt, qui absque auctoritate publica, hostiliter grassantur, veluti Latrones in terra, Piratæ in mari. Prioris generis fuerunt, quos Crassus in citeriori Gallia Provincias infestantes etsi nullo illustri Duce, neque eo nomine aut numero essent, ut populi Romani hostes dicerentur, confectatus est, posterioris Cilices, quos quod rupto fœdere generis humani, sublatis commerciis, maria bello, quasi tempestate præcluserant, uti ait Florus, primum Servilius compescuit, postea Pompeius penitus profligavit. Denique justii Hostes sunt, quibus omnia*

Belii jura debentur, quos ita definit Ulpianus, Hostes sunt, quibus bellum populus Romanus decrevit, vel Ipsi populo Romano, de quibus etiam Cicero. Hostis est, inquit, qui habet rem publicam, curiam, ærarium, consensum, & concordiam civium, & rationem aliquam, si res ita tulerit, & Pacis & Belli.

Vid. 1. Aristot lib. 3. cap. 10. Justin. lib. 1. in princ. Bodinum lib. 2. cap. 2.
2. Grotium lib. 3. cap. 15. Sigonius de jure italic. 12. cap. 12. lib. 1. cap. ult.
3. Hotou. de verb. feud. Patronus. & Longobardici vult de feudis cap. 1. Tacitum de moribus Germanorum. 4. Hotoman quasi illust. 7. Bodinum lib. 1. cap. 7. nu 69. Gentilem lib. 1. cap. 4. 5. Ayalam lib. 1. cap. 2. Grotium lib. 3. c. 3. §. 1.

SECT. VIII.

De Dominio inter eos quibuscum Bellum.

Dominium inter eos quibuscum Bellum intercedit, est cum Res & persona singula Captivitate in potestatem rediguntur, vel Postliminio recuperantur. Et cum Res universa Deditioe vel victoria in dominium veniant.

1. **L**Ex est, inquit Aristoteles, veluti pactum quoddam commune, quo bello capta capientium fiunt, & Cajus Jurisconsultus quæ ex hostibus capiuntur statim capientium fiunt, adeo quidem, ut & Liberi homines, in servitutem deducantur. Ad personas vero bello captas quod attinet, etsi jure gentium antiquo quo licuit interficere, in servitutem redigebantur, inter Christianos mos obtinuit captos duntaxat custodiendi, donec redemptionis pretium persolutum sit, ad arbitrium capientis, nisi de certo aliquo conveniret. In bello vero alia privatis & singulis, alia Principi vel populo acquiruntur. Privatis & singulis quæ in actu privato, qui fit occasione belli, publice capiuntur, qualia sunt spolia quæ detrahuntur hosti in dimicatione singulari, & quæ procul ab Exercitu, in liberis & injussis excursionibus milites lucrantur, quod genus prædæ Itali Corramiam vocant, & à Butino distinguunt Cui non dissimile est quod Nautis militantis conceditur, Galli Pilagium, aut Despoilationem vocant, & eo comprehendunt, vestem, argentum quoque &

& aurum intra decem scutatos. Principi vel populo acquiruntur, quæ capiuntur actu belli publico, & communi, quia in hoc singuli reipub. personam sustinent. Itaque prædam Marathoniam asservavit Aristides, & post prælium ad Platæas, severe edictum ne quis de præda quicquam privatim tolleret. Hanc tamen prædam Imperatores militibus aliquando diripiendam, aliquando dividendam permittunt. Direptio militi permittitur aut in populatione, aut post prælium vel expugnationem, ut signo dato discurratur. Ita Tarquinius Suessam, castra Equorum Quintus Servilius Dictator, Veios urbem Camillus militi diripiendam dederunt. Dividitur præda aut ratione stipendiorum, aut ratione meritorum; stipendiorum ratione prædam dividi Appius Claudius volebat, ita ut proportio simplex Pediti, duplex Centurioni, triplex Equiti daretur: Meritorum etiam ratio sæpè habita est, sicut Martius, quod fortiter fecisset, ex prædâ Coriolanâ, à Posthumio donatus est. Utrovis autem modo divisio fiat, solebant Imperatores sibi præcipuum aliquid assumere, ita Livius de Tarquinio, & Ipse ditari volebat, & popularium Animos præda delinire.

2. Postliminium est, uti definit Paulus Jurisconsultus, jus amissæ rei recipiendæ ab extraneo, & in statum pristinum restituendæ; inter Romanos ac liberos populos, Regesque moribus & Legibus constitutum. Cum extraneis intercedit, id est quibuscum apertæ inimicitie sunt ut Romanis cum Germanis & Parthis, vel quibus bellum indictum est, nam apud eos servi fiunt inquit Ulpianus, & ab iis capti postliminio statum pristinum recuperant: E contra cum Latronibus, & in Civilibus dissentionibus, locum non habet, quia vice Hostium non sunt inter quos Captivitatis, & Postliminii jura fuerint. Hoc jus competit Personis cujuscunque generis, rebus vero nonnullis duntaxat. De Personis Paulus, Postliminium est inquit Hominibus cujuscunque sexus, conditionisve sint, nec enim soli postliminio recipiuntur, qui pugnare possunt, sed omnes homines qui ejus naturæ sunt, ut usui esse, vel consilio, vel aliis modis possunt, sed & servi virtute militum recuperati Dominis suis restituntur. Receptos enim eos non captos judicare debemus, & militem nostrum defensorem eorum esse decet, non Dominum inquit Imperatores. Transfugis autem ait Paulus nullum est postliminium. Nam qui dolo malo, & proditoris animo patriam

reliquit, in hostiū numero habendus est. Sed nec qui armis victi se hostibus dederunt, postliminium habent. Et, uti Pomponius, si captivus de quo in Pace cautum fuerat, ut rediret, sua voluntate apud Hostes mansit, non est ei postliminium; Nec quemadmodum censuit Florentinus, satis est corpore quem rediisse, si mente alienus est, & ideo de Attilio Regulo, quem Carthaginienses Romam miserant, responsum est, non esse eum postliminio reversum, quia iuraverat se Carthaginem reversurum, & non habebat animum Romæ remanendi. Nihil vero interest quomodo captivus reversus est, utrum dimissus, an vi vel fallaciâ ex potestate hostiū evaserit. Et ad postliminium, inquit Paulus, sufficit, non solum si in fines nostros intraverit, sed & si in Civitatem sociam, amicamve, aut ad Regem socium, vel amicum venerit, quia ibi primum nomine publico tutus esse incipit. Effectus postliminii est, non solum ut quis statum recuperet, sed, quod tradit Pomponius, cum reversus fuerit, perinde omnia ei jura restituantur, ac si captus ab hostibus non esset. Ad res captas quod attinet, primum immobiles ut agri & prædia postliminio recipiuntur, cum ut ait Pomponius, verum est expulsis hostibus, ex agris quos ceperunt, dominia eorum, ad priores dominos redire, nec aut publicari debere, aut prædæ loco cedere. Cui etiâ congruit, quod cū loca sacra, vel religiosa capta sunt ab hostibus desinūt religiosa esse, quod si ab hac calamitate fuerint liberata, quasi quodam postliminio reversa, restituntur. Secundo, res etiam mobiles quædam ad belli usum comparatæ postliminio recuperantur, ita Marcellus, Navibus, inquit, longis, atque onerariis propter belli usum, postliminium est, nō piscatoriis, aut si quas actuariæ voluptatis causâ aliqui paraverunt. Equus etiam aut equa frangi patiens recipitur postliminio. Arma vero postliminio reverti negatur, quia turpiter, & non sine flagitio amittuntur, & idem de vestibus affirmat Pomponius.

3. Deinde universum Dominium in res & personas regiones scilicet & populos acquiritur Deditio & victoria; Deditio est cum Populus in alterius potestatem concedit, quæ alias vis & arma ereptura videbantur, ita Syriæ, Mesopotamiæ, Lybiæ, & Ciliciæ populi, se & res suas Nabuchadonofori concesserunt. Omnis, inquit, Civitas nostra, omnes montes & colles & campi, & armenta boum, gregesque ovium, & caprarum & equorum, & camelorum,

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& universæ facultates nostræ & familiæ in conspectu tuo sunt, sint omnia nostra sub lege tua, Nos etiam & filii nostri servi tui sumus. Ita Falisci Romanis per Legatos, in Senatu, sub ditione vestra sumus, mittite qui arma, qui obsides, qui urbem patentibus portis accipiant, nec vos fidei nostræ, nec nos imperii vestri pœnitebit. Et Campani ad eosdem Romanos, Populum Campanum, urbemque Capuam, agros, delubra Deum, divina humanaq; omnia, in vestram Patres Conscripti, populi que Romani ditionem dedimus, Quicquid deinde pattemur, Dedititii vestri passuri. Cujusmodi Deditio-nis effectus, uti refert Livius, est, ubi omnia ei qui armis plus potest dedita sunt, quæ ex iis habere victor, quibus eos multari velit, ipsius jus atque arbitrium est. Victoria plenaria habetur cum Hostes clade afficiuntur, qua bello finis imponitur, unde urbes, territoria regiones in victoris Dominium veniunt. Itaque cum Volscorum Legati, urbes à Romanis captas instinctu Coriolani repeterent, responsum est. Si nobis oppida dedissetis, post pœnitentia ducti ea repeteretis, certè injuria vobis fieret, nisi ea reciperetis: si vero jure belli iis spoliati fuissetis, cum nullum amplius in ea dominium habeatis, injuriam facitis quod res alienas appetatis. Nos enim justissimas possessiones ducimus, quas armis victores quæsumus. nec Legem istam nos prius constituimus, nec eam hominum potius quam Deorum existimamus, sed cum omnes tam Græcos, quam Barbaros hac uti sciamus, nihil molliter remitemus. Magnum enim esset vitium, si quis virtute & fortitudine parta per ignaviam & stultitiam amitteret.

4. Ita Romani ab Armis & armorum intuitu, Regiones cum populis sub potestate, ad publicum commodum, alias jure Proprio, alias jure subsidiario, alias jure Clientelari habuerunt. Jure proprio in potestatem populi Romani devenerunt, cum regiones unacum populis in ejusdem Imperii ditionem ascitæ sunt, & cum populi Imperii Romani in regiones devictas deducebantur. De primo modo Livius rem Romanam auctam dicit Hostibus in Civitatem receptis, & Seneca, quid hodie esset Imperium nisi salubris prudentia victos, victoribus permiscuisset? & Claudius apud Tacitum Conditor, inquit, noster Romulus, tantum sapientia valuit, ut plerosque populos eodem die hostes, deinde cives habuerit. Nimirum post atrocem pugnam cum Sabinis, qui ob virgines raptas urbe non invaserant, pax facta est cum Tatius eorum rege, sequutaque, inquit

inquit Florus, mira res, ut relictis sedibus suis, in novam urbem Hostes demigrarent, & cum generis suis, avitas opes pro dote sociarent; & Tullius Hostilius Alba diruta, omnes opes urbis, ipsumque populum Romam transtulit, prorsus, ut idem Florus, ut consanguinea Civitas non interiisse, sed in suum corpus rediisse videretur. Ita superatis penitus Latinis Camillus in Senatu consuluit. Pacem vobis quod ad Latinos attinet parare in perpetuum, vel saviendo, vel ignoscendo potestis. Vultis cru deliter consulere in dediros, victosque? Licet delere omne Latium, vastasque inde solitudines facere, unde sociali egregio exercitu per multa bella, magnaque sæpe usi estis. Vultis exemplo majorum, augere rem Romanam victos in Civitatem accipiendo? Materia crescendi per summam gloriam suppeditatur. Certe firmissimum longè imperium est, quo obedientes gaudent &c. De posteriori modo Gellius, qui tradit, Colonias fuisse Civitates, ex Civitate Romana propagatas, nam Romulus uti refert Dionysius quæ oppida bello cepit, ea neq; diruit, neque Libertate multavit, sed ferè in agrum ab iis captum colonias ab urbe deduxit, deinde Romuli vestigia, cæteri Reges, atque exactis Regibus, Senatus, populusque, & Senatus, populi que autoritate infirmata, Imperatores sequuti sunt. Cujusmodi instituti prudenterissimi sex causas ex veterum annalium verbis Sigonius recenset, unam ad priores populos coercendos, alteram ad hostium incursiones reprimendas, tertiam stirpis augendæ causa, quartam plebis urbanæ exhauriendæ, quintam seditionis evitandæ, sextam ut præmiis milites veteranos afficerent.

5. Jure subsidario Regiones habebantur, quæ potentioribus necessaria suppeditare tenebantur veluti milites, pecuniam, annonam & similia. Ita Romani ex iis gentibus Italiæ cum quibus fœdus pacis injerunt, & ex Provinciis milites imperare potuerunt: de quibus Polybius, Per idem tempus magistratus Consulari potestate præditi edicunt Præfectis sociarum Civitatum in Italia, è quibus putant auxilia accersenda numerum indicantes, diemque & locum in quem convenire oporteat qui delecti fuerint, ac Civitates simili edicto, delectu habito, mittunt sacramento adactos milites, constituto Præfecto, & mercedis exhibitore. Pecuniæ Tributum erat annum quod Provinciis impositum erat, de quo Petilius Cerialis apud Tacitum pro Romanis ad Gallos sic disseruit, Nos quanquam
 toties

toties laceffiti, jure victoriæ id folum vobis addidimus quo pacem tueremur, nam neque quies fine armis, neque arma fine ftependiis, neque ftependia fine Tributis haberi queunt. Denique pro anno- na in Provinciis Agricola frumentum Decumanum fine pretio da- re, & Emptum pretio, Romæ Senatus confulto, conftituto pendere tenebantur.

6. Clientelæ jure fub poteftate funt Populi liberi qui ob Pro- tectionem in fide & obfequio conftituti funt. Ita cum duæ effent in tota Gallia factiones, Eduorum fcilicet & Arvernorum, populos alios qui ipsis adhærebant Cafar Clientes appellat, de Populis & gentibus qui in Romanorum clientela erant, penes quos erat (uti loquitur Tacitus) Romani imperii reverentia, & de quibus Florus. Illique reliqui, qui immunes imperii erant, sentiebant tamen mag- nitudinem, & victorem gentium populum Romanum revereban- tur. Ita Campani cum protectionem Romanorum peterent; Nulla Colonia veftra, inquiunt, erit quæ nos obfequio erga vos, fideque fuperet, quod vos pro falute noftra prius feceritis, id nos pro impe- rio veftro & gloria femper faciemus. In eo clientes à vafallis dif- ferunt, quod vafalli in ditione & fub Imperio Domini fupremi funt, Principes & populi in clientela aliorum ab imperio funt immunes: ita Proculus Jureconfultus; Clientes noftros liberos effe intelli- gimus, etiamfi neque authoritate, neque dignitate, neque jure omni nobis pares funt.

Vid. 1. Grotium lib. 3. cap. 6. §. 12. & c. 2. Digeff. & Cod. de Captivis & poftliminio. 3. Arnifæum lib. 1. cap. 3. 4. Grotium lib. 3. cap. 15. §. 3. & Sigonium lib. 2. cap. 2. 5. Rofinum lib. 10. cap. 4. & 22. 6. Arnifæum lib. 1. cap. 4. nu. 3. 6 7.

S E C T. IX.

De Debito inter eos quibuscum Bellum.

Debitum inter eos quibuscum Bellum est, est quod iis præstandum quibuscum Lis, aut Bellum intercedit, veluti fuis congressus, Legationis, Conventionis, & Fœderis militaris, quæ quandoque obſidibus datis, vel cautione reali confirmantur.

¹ **C**ongressus militaris est, cum Principes, vel Duces Belli in Colloquium, vel in pugnam conveniunt. In Colloquium convenitur, ut rationibus hinc inde prolatis, lites forsitan transigantur. Ita in colloquium convenisse perhibentur, Eumenes, & Ptolomæus: Seleucus, & Demetrius ad Oroſsum, Lucullus, & Pompeius apud Damulam; Cæsar, Antonius, & Lepidus, exercitibus pone se relictis, coierunt ad pontes Lavinii fluminis, nempe apud urbem Bononiæ: ad id loci ubi perventum est, Lepidus, insulam, quæ ibi est, perlustrata, Chlamyde signum dedit, quo viso insulam intrarunt, & relictis ad pontes trecentis unâ cum amicis, in medium progressi aperto campo constiterunt, Cæsar propter imperium medius. In Pugnam Principes conveniunt, ut eventu victoriæ controversiæ terminentur, & ¹ quandoque ipsi in certamen singulare coeunt, ² quandoque condito militum numero decernunt, ³ plerumque inter exercitus præliis dirimendas lites subjiiciunt. De certamine singulari inter Principes refert Agathias, Morem fuisse Francorum ut siquæ inter Reges oriantur discordiæ, aciem omnes instruant, tanquam bellaturi ad rem decernendam; at ubi conspicati sunt se invicem Exercitus, Regibus authores sunt, ut jure potius decertent, aut si nolint, ipsi inter se singulari certamine, & suoduntaxat periculo, rem transigant. Neque enim aut æquo, aut bono, aut patriis institutis convenire, ut ipsi, ob propria odia bonum publicum labefactent, & evertant. Ita olim Hillus, & Echemus de Peloponneso, Hyperochus, & Phemius de regione ad Inachum; Pyrræchne, Ætolus, & Degmenus Epeus de Elide, Corbis & Orſua de Iba contenderunt. 2. Quandoque condito, & certo numero ad decernendum de belli causis certamina ex consensu principum, & pugnanti-
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um ineuntur. Ita inter *Ætolos*, & *Eleos* bini utrinque congressi sunt; inter *Romanos*, & *Albanos*, misso, inquit *Florus* in compendium bello, tres *Horatii*, cum tribus *Curiatiis*; inter *Lacedæmonios*, & *Argivos* trecenti utrinque, cum utriusque partis discrimine pugnaverunt. 3 Plerumque inter majores exercitus, dimicationibus præviis, & præliis subsequeantibus Lites expediuntur; ita cum *Alexander* primum *Perfiam* intrasset, missa à *Dario* parte exercitus, quibus mandatum, ut insanientem *Philippi* adolescentulum, verberibus castigatum ad se adducerent, *Alexander*, in eminenti *Granici* ripa astantes, cum multo suorum discrimine aggressus, virtute *Macedonum* vicit, & profligavit. Deinde cum toto *Darii* exercitu, aciebus hinc inde instructis, congregiens, prælium iniit, quo *Perfarum* peditum centum millia, *Equitum* decem millia interfecta; ex parte *Alexandri*, quatuor, & quingentis sauciis, peditum triginta duobus, *Equitum* quinquaginta tantum interfectis. Deinde cum iterum *Granicum* superasset, & *Mazeus*, *Darii* Dux præcipuus, contra eum mille equites præmiserat, *Alexander* *Aristonæ* præponit equitum præfectum, laxatis habenis in ipsos invehi jussit, qui insigni pugna cum hostibus commissa, *Satrapocem* præfectum *Equitatus* *Perfarum*, directa in gutture hasta transfixit, fugientemque per medios hostes consequutus, ex equo præcipitavit, & obluctanti caput gladio dempsit, quod relatum magna cum laude ante *Regis* pedes posuit. Inde *Alexander*, cum exercitu contra *Darii* copias profectus, cum iisdem ad *Arbellas* pugnavit, ubi *Dario* in fugam verso, *Perfarum* quoadraginta millia caesa, *Macedonum* minus quam trecentum desiderati sunt.

In his Congressibus armatis, sive Præliis, qui virtutis eminentioris sunt; Dignitatis, & Honestatis rationem habent. Itaque cum ante prælium ad *Arbellas* *Parmenio* furto, non prælio opus esse censeret, intempesta nocte opprimi posse hostes, discordes moribus, linguis, ad hæc somno & improvise periculo territos, quando in nocturna trepidatione coituros? at interdum primum terribiles occurruras *Scytharum*, *Bactrianorum*que facies, hirta illis ora, & intonsas comas esse, præterea, eximiam vastorum corporum magnitudinem, Militem vanis, & inanibus magis, quam justis. formidinis causis moveri, Omnesque ferè *Parmenioni* assentirentur, *Polypercon* haud dubie in eo consilio victoriam positam arbitrabatur, A-

Alexander, Latrunculorum, inquit, & furum ista solertia est, quam præcipitis mihi, quippe illorum votum unicum est fallere. Meæ vero gloriæ semper, aut absentiam Darii, aut angustias locorum, aut furtum noctis obstare non patiar, Malo me fortunæ pœniteat, quam victoriæ pudeat. Itaque ad prælium vos parate. Ad honestatem refertur, quod cum Camillo Consule, Faliscos circumfidente, magister ludi plurimos, & nobilissimos inde pueros, veluti ambulandi gratia, eductos in castra Romanorum perduxisset, quibus interceptis, non erat dubium, quin Falisci, deposita belli gerendi pertinacia, tradituri se Romano imperio erant, de ea re Senatus cœsuit, ut pueri magistrum victum, virgis cædentes, in patriam remitterentur; qua iustitia animi eorum sunt capiti, inquit Valerius, quorum mœnia expugnari non poterant. Nam Falisci beneficio magis, quam armis victi, Romanis portas aperuerunt. Florus, Eam, inquit, Camillus vir sanctus, & sapiens sciebat veram esse victoriam, quæ salva fide, & integra dignitate pararetur. Ita etiam cum Timochares Ambracensis, Fabricio Consuli pollicitus esset, se Pyrrhum veneno, per filium suum, qui potionibus ejus præerat, necaturum; Fabricius rem ad Senatum detulit, & author fuit, ut missis Legatis, Pyrrhus moneretur, ut adversus hujus generis insidias cautius se gereret, memor urbem à filio Martis conditam, & armis bella, non venenis geri debere. De quo etiam Seneca, Fabricius, inquit, Pyrrhi Regis auro repulit, & idem Medico Pyrrhi promittente, se venenum daturum, monuit Regem, ut caveret insidias, & ejusdem animi fuit, auro non vinci, veneno non vincere. Unde, admirati sumus, inquit, ingentem nimirum virum, & quod difficillimum, in bello innocentem, & qui aliquid crederet, etiam in hostem nefas. Ad hoc exemplum, cum Cætorum Princeps, Arminii Romanorum hostis favissimi, & perfidi mortem polliceretur, si patrandæ neci venenum mitteretur, Tiberius Imperator, & Senatus responderunt se non fraude, & occultè, sed armatos, & palam hostes suos ulcisci.

Nec tamen omnia viribus duntaxat, in bello sunt præstanda, quædam etiam honestâ astutia, & solertia perfici possunt. Ita Polybius ait, quæ vi finiri in bello, aliquando minoris esse quàm quæ ex occasione, & dolo geruntur. Et Valerius Maximus, est pars, inquit, aliqua calliditatis egregia, & ab omni reprehensione remota, cujus opera stratagemata vocantur, quæ & in paucorum certaminibus, & in præ-

præliis inter Exercitus adhibere licet. De paucorum certamine insigni est exemplum quod refert Florus, ubi Romani & Albani pari robore, frequentibus præliis, utrique comminuerentur, Horatiiis, Curiatiiisque tergeminiis hinc atque inde fratribus, utriusque populi fata commissa sunt. Anceps, & pulchra contentio, exituque ipso mirabilis. Tribus quippe illinc vulneratis, hinc duobus occisis qui supererat Horatius, addito ad virtutem dolo, ut distraheret hostem, simulavit fugam, singulosque prout poterat, adortus, superavit. De præliis inter Exercitus, in quibus non minus solertia, quam virium adhibitum est, exempla etiam commemorat Valerius, primum Annibalis cum Romanis, deinde Romanorum cum Asdrubale & Annibale. Annibal, inquit, priusquam ad dimicandum Cannensi prælio descenderet, aciem populi Romani compluribus astutiæ laqueis implicavit; Ante omnia enim providit, ut & solem, & pulverem, qui ibi vento multus excitari solet, adversum haberent: deinde partem copiarum suarum, inter ipsum prælii tempus, de industria fugere iussit, quam cum à reliquo exercitu abruptam, Legio Romana sequeretur, trucidandam eam ab iis quos in insidiis collocarat, curavit: postremo quadringentos Equites subornavit, qui simulata transituone, petierunt Consulem, à quo iussi, more transfugarum, depositis armis, in ultimam pugnae partem secedere, destituti gladiis, quos inter Loricas, & tunicas abdiderant, poplites pugnantium Romanorum ceciderunt. Hæc, inquit, fuit Punica fortitudo dolis, & insidiis, & fallacia instructa, quæ nunc circumventæ virtutis nostræ excusatio est, quoniam decepti magis quam victi fuimus. Deinde refert, cum alterum Italiæ latus Annibal laceraret, alterum invasisset Asdrubal, ne duorum fratrum junctæ copiarum, intolerabili onere fessas simul res Romanas urgerent, hinc Claudii Neronis vegetum consilium, illinc Livii Salinatoris inclita prudentia effecit. Nero enim compresso à se in Lucanis Annibale, præsentiam suam (quoniam ratio belli ita desiderabat) mentitus hosti, ad opem Collegæ ferendam per longum iter mira celeritate tetendit. Salinator apud Metaurum flumen in Umbriâ proximo die dimicaturus, summa cum dissimulatione Neronem castris noctu recepit. Tribunos enim à Tribunis, Centuriones à Centurionibus, Equites ab Equitibus, Pedites à peditibus excipi iussit, ut sine ulla tumultuatione, solo vix unum exercitum capiente, alterum inferuit. Quo evenit, ut Asdrubal

cum duobus Consulibus se praeliaturum nesciret, priusquam ab utrisque prosterneretur, Ita, inquit, illa toto terrarum orbe infamis Punica calliditas frustrata fuit, cum Romana prudentia Annibalem Neroni, Asdrubalem Salinatori decipiendum tradidit.

2. Legatio militaris est, quæ ad tractandum de Rebus ad bellum pertinentibus adhibetur. Qui huiusmodi Legationes ordinariè obibant, apud Græcos Caduceatores dicti sunt, quod Caduceum, sive baculum Mercurialem, anguium cristatorum effigie circumdatum gestabant. apud Romanos Feciales appellati sunt, quorum præcipuus erat Paterpatratus, qui & patrem & liberos habebat, qui pro insigni gerebant, verbenam, herbam Jovi sacram, quâ etiam domus lustrabantur. His apud Modernos Heraldici successerunt, Regum solennes nuntii, qui insigniuntur veste pictâ, vel versicolori, insigniis Principum à quibus mittuntur, segmentata. Huiusmodi nuntii ad exposculandum injurias, ad res ablatas repetendum, ad minas, aut bellum denuntiandum, ad securitatem Legatis aliis veniendi, & redeundi impetrandam, adhibebantur. Extraordinarii, & magis solennes legati sunt, qui ad tractandum de Induciis, & pace earumque conditionibus destinantur. Huiusmodi Legatis eadem humanitatis & benignitatis officia quæ Legatis Civilibus, nequaquam exhibentur; Adventantibus obviam mittuntur, qui denuntient, ne propius accedant, neque in urbem, aut in Castra admittuntur. Prisco instituto, apud Romanos, Legatis hostium, ad Bellonæ ædem, extra urbem Senatus dari solitus est. Ita Ezechias Legatum Senacharibis, Hierosolyma exclusit. Et Gothi, qui præsidio Urbinum tenebant, oratores Belisarii in urbem admittere renuerunt. Titus Quintius, Legatos Brutorum, qui tunc hostes erant, in castra non admisit. Constantius etiâ Legatos Magnentii castris exclusit. Quandoque tamen, à potentioribus missi majori comitate excipiuntur, ita Pyrrhus Legatis Romanis, ad redimendos captivos, castra sua petentibus, quo tutius venirent Lyconem Molossum obviam misit, & quo honoratius exciperentur, Ipse cum ornatu Equitum extra portam iis occurrit, secundarum rerum successu, non adeo elatus, ut officii respectum in eos deponeret, qui tum maxime armis cum eo dissentirent. Et qui vires suas ostendere non verentur, Legatos quandoque in castra admittunt: sic Legati Scytharum viginti, per castra Alexandri equis vecti, in tabernaculum admissi, & considere iussi

jussi sunt sic Constantinum legatum Romanum Pirozes, & Tullius Menophilus Legatos Carporum, in castris excepit. Consules Romani, qui Utica erant, cum à Carthaginensibus Legatio advenisset, in sublimi Tribunali confidentes, adstantibus utrinque Ducibus, & Tribunis, & agminibus legionum, fulgentibus aquilis, fixisque ubiq; signis, ut Legati numerum copiarum ingentem agnoscerent, tuba silentio indicto, per præconem Legatos accedere jusserunt. Illi per Ordines armatorum transeuntes, ad Locum Tribunalis pervenerunt, Ibi Legati jussi quid petentes venissent, exponere. His tamen non minus, quam Legatis in pace securitas debetur. ita Cicero, Legatus is esse debet, qui non tam Caduceo, quam nomine Oratoris inter hostium tela incolumis versari possit.

3 Conventiones Militares, sive bellicæ sunt (de quibus Ulpianus Jurisconsultus) quoties Duces belli, quædam inter se paciscuntur. Et Duces belli vel summi sunt, utpote Imperatores quorum auspiciis bellum geritur, ita Livius, Nec duces belli agnoscimus, nisi cujus auspiciis bellum geritur vel Inferiores, unde Cæsar, aliæ Imperatoris, aliæ Legati partes sunt, alter liberè, ad summam rerum consulere, alter ad præscriptum agere: Et hujusmodi Duces, de iis quæ ad Belli administrationem pertinent pacisci possunt, cum Princeps vel Dux summus in remotis agit. Ejusmodi pacta vel conventiones sunt, 1 de Commeatu. 2 de Induciis. 3 de Captivis permutandis & redimendis. 4. De Conditionibus, iis, qui loca obsessa dedunt, præstandis, & similia. 1. Commeatus est Licentia, durante bello, personis singulis, vel certis, concessa tuto eundi, & redeundi, quibus securitas præstanda, non solum intra territorium, sed etiam alibi, à militibus concedentis. 2. Induciæ à Paulo definiuntur, Cum in breve, & in præsens tempus convenit, ne invicem se laessant, Varro castrorum pacem, & belli ferias vocat. In quibus ab omnibus actibus bellicis abstinendum, ire, redire, sine apparatu bellico permittendum. Quemadmodum cum Roma à Tarquinio obsideretur, & inter Porsernam, & Romanos factæ essent induciæ, ubi Ludi Circenses in urbe celebrarentur, Hostium Duces ingressos, curuli certamine contendisse, & victores coronatos fuisse, perhibetur. 3. Conventiones ineuntur de permutandis, & redimendis captivis. Nam quamvis Alexander Regie dixerit, Me non mercatorem memini, sed Regem; Captivos, si placuerit, reddi, dono dabitur.

dabimus honestius, quam pretio remitteremus : & Pyrrhus se gratis redditurum captivos polliceretur, si Pax fieret, alias nullo modo, cum iniqua esset petitio ut iis captivos redderet, quibus hostes contra se uterentur. Aliis tamen honestum fatis, & magis utile, visum, pretio redimendos proponere: ita Annibal, cum milites quidam Romani, post pugnam Cannensem in manus venissent, pretium redemptionis singulis constituit, Equiti scilicet quingenos quadrigatos nummos, pediti trecentos, servocentum. Decemque ex iis, ut aurum in redemptionem impetrarent, Romam misit, iurejurando prius ad actos, si non impetrarent, se ad hostem redituros. Quorum cum unus, in senatu causam egisset, & clamore flebili sublato, orantium ut sibi Liberos, fratres, cognatos redderent Patres Alii de publico, alii de privato, alii ex arario pecuniâ mutuâ redimendos retulerunt. Sed Titus Manlius Torquatus, quod cum Publio Sempronio Tuditano, & aliis, qui ipsum foeliciter sequenti, in hostes erumpere noluerunt, non magis eos redimendos censuit, quam illos Annibali dedendos qui per summam virtutem patriæ se restituisent. Et Certe Romana Civitas, uti refert Livius, in captivos jam inde antiquitus minimè indulgens: ac proinde Quintus Fabius Maximus, qui de redemptione captivorum, qui melius meriti erant, cum hostibus pepigisset, cum id pactum à Senatu improbaretur, fundum suum ducentis millibus vendidit, & datæ fidei satisfecit.

4. Ut dominia & territoria, ne vi ab aliis abripiantur, in potestatem aliorum pura deditione nonnunquam conceduntur, ita arces, oppida, & loca prædiis munita, ad evitandum expugnationis incommoda, pactis prius conditionibus, hostibus deduntur, & si priusquam periculum extremum immineat, ad Imperatoris fidem confugiunt, meliores conditiones sortiuntur. Ita Cæsar Advaticis denunciavit, se eorum civitatem conservaturum, si priusquam aries murum percussisset, se dedissent. Aliàs ut cum bonis decedant, ut incolumes, ut cum armis, ut in locum certum deducantur & obseffi paciscuntur, quæ si deditio sequuta fuerat omnimodo observanda; itaque cum Marcus Fulvius accusaretur, quod contra condiciones deditionis Ambraciam diripuisset, Ique contenderet urbem non deditam sed vi captam, quod aggere & vineis oppugnata fuerit, quod super muros, subterque terram per dies quindecim pugnatum erat, Senatus censuit, urbi quæ propter conventas condiciones, Fulvio portas aperuisset, res suas omnes restituendas esse.

4. Fœ-

4. *Fœdera militaria, sive bellica*, eorum qui summum imperium habent, autoritate contrahuntur, vel de *Induciis* longioribus, quæ vulgo *Treugæ* dicuntur; vel de *Pace perpetua*. Etsi enim *induciæ* plerumque, pro necessitate, & occasione aliqua præsentis, in breve aliquod tempus constitui solent, aliquando tamen pro longiori tempore conceduntur, veluti cum à Romanis *Veientibus*, *induciæ* centum annorum, deinde *quadraginta*, demum *viginti annorum* datae sunt, quæ ad instar *Pacis* habentur, & cum graviore periculo violantur. *Fœdus* vero, vel *pactum Pacis* est quo convenit, de cessatione perpetua à vi & armis, ea siquidem est *Pacis* natura, ut sit perpetua, & sic est in formulâ, Romanis & Latinorum populis *Pax* esto, dum cœlum, & terra eandem stationem obtinent; Cujusmodi *fœdus*, prout in tripartita *Menippi* partitione habetur, alterum est, cum pares bello, æquo *fœdere* in pacem atq; *Amicitiam* coeunt, alterum, cum bello victis dicuntur *leges*, quo in genere quid victum habere, quo mulctari eum velit, victoris est *Arbitrium*. Illud vero propriè *fœdus* est, cum de bello componendo, ab utroque belligerante, penes quos est bellum decernere, convenit, in quo de offensionibus remittendis, vel reparandis, de finibus regundis, de commerciis, & similibus transigitur, tum vero firmissimè, cum ut *Tullus Albanorum Ducem* monebat, non tam cogitatur de sancienda in præsens *amicitia*, quam ne relinquatur in posterum ulla renovandi belli materia. Alterum minus propriè *fœdus*, vel *pactum pacis* dici potest cum post victoriam, de futuræ pacis conditionibus victores per se statuunt, Quemadmodum *Carthaginenses*, post primum bellum *Punicum*, victi, fractique coacti sunt, conditionibus à Romanis oblati se submittere, scilicet, ut *Siciliâ*, & omnibus *Insulis* inter *Italiam*, & *Africam* excederent, duo millia, & ducenta *talenta* *Euboica*, in viginti annos penderent, captivos Romanos sine pretio redderent, & ut utriusque populi *focii*, apud utrumque securi essent.

5. Atq; hujusmodi *Fœdera*, sive *pacta*, ut majori autoritate contrahuntur, ita aliquando *Obsidibus*, qui *fidei publicæ* servandæ causâ dantur, confirmari solent, aliquando etiam arces, & oppida in cautionem conceduntur, Cum vero victis *Pax* datur, majores cautelæ adhibentur; Ita vetustum Romanorum morem fuisse, tradit *Livius*, ut cum quibus *fœdere*, non æquis legibus, jungerentur non prius in eos imperio, quam pacati uterentur, quam cum

omnia divina, humanaque dedidissent, Obsides accepti, arma adempta, praesidia imposita fuissent.

Vid. 1. Paschalium cap. 28. Grotium lib. 2 cap. 23. §. 10. lib. 3 cap. 20. §. 43. Gentilem lib. 2 cap. 15. Q. Curtium lib. 1 2 3 4. Florentium lib. 1 cap. 12. Valer. Maxim. lib. 6 c. Florum lib. 1 cap. 3. Valerium lib. 7. cap. Frontinum de Strategematis. 2. Brunum. Ayalam lib. cap. 9. Gentilem de Legatione lib. 1 cap. 6. Paschalium cap. 22. 3. Gentilem lib. 3 cap. 14. lib. 2 cap. 10. 11. & Grotium lib. 3 cap. 19 cap. 30. & 21. Polybium lib. 6. Grotium lib. 3 cap. 20. §. 49. 4. Grotium lib. 3 ca. 19 & 20. Gentilem lib. 3 cap. 1. & 13. Besoldum de Pace pacisque jure 5. Erodium rerum judicat tit. de pactis pub. cap. 5. Gentilem lib. 2 cap. 19. Grotium lib. 3 cap. 20 §. 52.

SECT. X.

De Delicto inter eos quibuscum Bellum.

Delictum inter eos quibuscum bellum intercedit est 1. cum Bellum iniuste movetur, 2. cum contra Jus Congressus, & Legationis militaris quid admittitur. 3. Cum Conventiones, & foedera bellica non observantur, 4. Cum victor in Exequutione modum excedit.

1. **B**ellum iniuste movetur, cum nulla belli causa est, ut cum Aliqui in bellum feruntur, uti ait Tacitus, periculorum propter ipsa, avidi, vel causam iniquam habet, ut cum bellum suscipitur desiderio mutandae sedis, ut paludibus, & solitudinibus relictis, foecundius solū possideatur, quod veteribus Germanis belli causam fuisse narrat, idem Tacitus: vel causam habet frivolam, qualis fuit, quam refert Bodinus, cum Scoti contra Pictos, cum quibus sexcentum fere annos pacem, & amicitiam coluissent ob canes ereptos bellum gravissimum intulerunt. Praeterea bellum iniuste movetur, cum Indictione, vel denuntiatione omissa geritur, ita Aristides dixit, Philippum Macedoniae Regem, Caduceatoribus non uti, ea mente, ut incautos opprimeret.

2. Contra jus congressus militaris delinquitur, 1. Cum specie colloquii insidiae struuntur, ita Attalus, & Legati Romani in periculum inducunt, cum Prusias, Rex Bithyniae, pro mille equitibus, de quibus convenerat, universum exercitum duxit ad Colloquium.
2. Cum

2. Cum fraudulenter, & perfide agitur, veluti cum Albertus Comes Franconia in arce munitissimâ urbis Bambergensis, à Ludovico Imperatore cujus filium interemisisse insimulabatur, obsideretur, Otho Moguntinus Archiepiscopus; qui se Litis arbitrum profitebatur, Alberto juravit si secum ad Imperatorem proficisceretur, se, vel pacem impetraturum, vel ipsum in arcem reducturum, cui Albertus credens, ipsum sequutus est, & cum vix arcem egressi essent, Otho eum hortatur, ut in arcem prorsum redeant ne forte apud Imperatorem longiusculè futura esset mora, unde redierunt, prorsusque iterum egressi, ad Ludovicum perrexerunt, ubi cum statim Albertus captus, & capitali supplicio damnatus esset, Archiepiscopi fidem imploravit, cui Præsul respondit, se datæ fidei satisfecisse, qui semel rediisset incolumem, bis reducere non promississet; cui non dissimile id, quod Dercilidas, & Paches, egisse perhibentur, qui polliciti obsessis reditum in urbem, si ad se venirent, venientibus mortem minitati sunt, nisi urbem dederent & demum in urbem deditam reditum concesserunt. 3. Cum mendaciis hosti imponitur, ita cum Lucius Martius, & Attalus, qui in Græciam ad Philippum Regem Legati missi, reversi gloriarentur, quod per inducias, & spem pacis Regem decessissent, & magna pars Senatus probaret, veteres, inquit Livius, moris antiqui memores, novam istam sapientiam improbant, nec astu, sed vera virtute majores bella gessisse recolebant. Deinde circa congressum armatum, vel pugnam, ut indignum notatur, cum, uti ait Cicero, quod virtute effici debet, id tentatur pecunia, quæ scilicet subditi contra Principem, vel patriam corrumuntur, unde vituperatus Philippus, qui istam artem palam facitabat, profiteri solitus, se nullam arcem adeo munitam invenisse, quæ si asinus auro onustus accederet, non statim portas aperiret, unde mercator potius quam victor Græciæ nuncupatus est. Contra Jus Legationis militaris est delictum, si Legatis hostium vis aut injuria inferatur; unde qui Legatum hostium pulsasset, aut injuria affecisset dedit hostibus solebat, ita M. Æmilio Lepido, & Caio Flaminio Consulibus, L. Minutius & L. Manlius quod Carthaginensium Legatis manus intulissent, jussu M. Claudii Prætoris urbis, per fœciales iis traditi sunt, & Carthaginem advecti; & cum Legatos ab Apollonia Romam missos, Quintus Fabius, & Cn. Sempronius Ediles pulsavissent, eos Senatus continuo per fœciales Legatis dedit.

3. Tercio contra Conventiones militares delictum est. 1. cum Commeatu concesso, personæ offenduntur, in quo Alexandri fides accusata est, qui eos, quibus abitum indusserat, in itinere interfici iussit. 2.º cum circa inducias fraudulentè agitur, quemadmodum Thraces, qui cum Theffalis triginta dierum pacti inducias, noctu populabantur agros dicentes se dierum, non noctium inducias pepigisse. 3.º Cum in restitutione personarum, & rerum, fraus adhibetur, ut cum Plataenses, qui pacti erant captivos reddere, necatos reddiderunt; & cum Romani dimidiam partem navium Antiocho reddere obligati, naves omnes dissecuerunt, & singularum partem dimidiam ei reliquerunt. 4.º Et cum circa redemptionem fides non præstatur, quemadmodum ab eo, qui cum decem aliis, ab Annibale Romam missis, juratis, nisi pretium impetrarent redire in castra, postquam egressus esset, quasi aliquid oblitus, in castra rediit, & deinde comites sequutus est, & cum alii re infectâ ad Annibalem redierunt, domum abiit, tanquam fallaci in castra reditu se jurejurando exsolvisset, quod cum Senatus rescivit, censuit eum comprehendendum, & custodibus publicè datis ad Annibalem remittendum. 5.º Deniq; cum Deditionis conditiones non observantur, ut cum Saladinus, qui quod Afcalonam valido præsidio munitam censuit, convenit liberaliter de deditione, cum vero militibus fere vacuum comperisset, quasi deceptus, pactiones servare, abnuvit. Contra fœdera militaria delictum est, cum pacta induciarum, vel pacis violantur, Veientes quod bellum Romanis contra inducias movissent à stirpe cum oppidis omnibus à Romanis deleti sunt. Et cum Huniades dux fortissimus pacta cum Rege Turcarum pace, hortatu Cardinalis Legati à Consilio, cui fœdus illud non placuit, bellum redintegrasset. Hæc perfidia Turcas in tantam iracundiam egit, ut ingenti exercitu Christianos undique cederent, & profigarent, ac tametsi Sigismundus Imperator innumerabiles copias ad Nicopolim coegisset, nihilominus ingenti clade prostratus esset, & Legatus à Consilio missus à Latronibus interemptus est.

4. Denique delictum est in bello cum victores, penes quos est arbitrium, in Executione modum excedunt, ut pote 1.º Cum in supplices, & se dedentes sæviunt, quibus condonare, ait Jovius, cum humanitatis, tum Leges militiæ dicuntur, & Salustius in historia Jugurthina, cum puberes post deditionem interfectos narrasset, ait fa-

cium

ctum contra jus belli, 2^o Cum foeminae, & pueri interficiuntur, Quod Thraces capta Mycaleſſo feciſſe narrat Thucidides; Macedones cum Thebas cepiſſent, refert Arrianus, Alexander vero dixit, cum foeminis bellum gerere non ſoleo, & de pueris Camillus, Arma, inquit, habemus non adverſus eam ætatem cui, etiam captis urbibus, parcitur. 3^o Si Hoſtibus cæſis ſepultura denegetur quod belli jus commune vocat Appianus, Belli commercium Philo, ita Annibal C. Flaminium, Pub. Æmylium, Tiberium Gracchum Romanos, quaſi- vit ad ſepulturam, Idem Hannoni à Romanis præſtitum, Mithrida- ti à Pompeio, Archelao Regi ab Antonio, & Suidas, Lyſandro, ma- gno dedecori fuiſſe tradit, quod hoſtes caſos terra condi paſſus non ſit, & cum Thebani nollent Argivos hoſtes ſepeliri, bellum contra eos ob iſtam cauſam à Theſeo, & Athenienſibus illatum Iſo- crates narrat. 4^o Si loca ſacra & ſepulchra violentur, ita Philippus, inquit Florus, ultra jus victoriæ, in templa, aras & ſepulchra ipſa ſæviit.

Vid. 1. Grotium lib. 2. cap. 1. & cap. 22. 23. Ayala m lib. 1. cap. 12. Gentilem lib. 1. cap. 7. & c. Gentilem l. 2. cap. 1. Curtium. 2. paſchalium cap. 38 39 Volate- ranum Hiſtoria Franconi Brunum lib. 4. cap. 23. Paſchal cap. 25. 26. Beſel- dum cap. 5. 3. Gentilem lib. 2. cap. 4. Florum lib. 1. cap. 12. Bodinum l. 5. c. 6 4. Gentilem lib. 2. cap. 16. 17. & c. Grotium lib. 3. cap. 45. 11. & 12.

SECT. 1.

De Iudicio inter Gentes & de Quaestionibus Pacis.

Iudicium inter Gentes est quo de Controversiis inter ipsas earumve subditos statuitur, utpote 1^o cum certos Iudices habent 2^o cum in Arbitros compromittunt, 3^o Cum ratione loci iudicium subeunt, 4^o Cum Prudentes de iis censura ferunt.



Rater Iudicium Belli, cujus accipiti & luctuoso eventu Controversiæ inter Principes & populos qui superiorem non habent, ut plurimum terminantur, aliquando populi vicini quantumvis liberi ad Lites inter se dirimendas certos Iudices habent, quales inter Amphyctionas, septem scilicet celebres Græciæ urbes quæ alias ferè omnes in societatem pertraxerunt Iudices erant, quos Mirios appellabant, qui in Conventibus in quibus omnium Legati interesse solebant, de rebus & causis inter ipsos contingentibus decernebant, cujus Tribunalis tanta fuit autoritas, ut ipsi Dii sua iurgia ad Amphyctionas retulisse dicantur. Et in Gallia ejusmodi conventus habitos fuisse scribit Cæsar, cum tamen Hedui, Carnutes, Arverni, Bellocassi, haberent Optimatum imperia, à se invicem divisa, omnium tamen dissidia Druidorum, decretis ac judiciis decernebantur.

2^o. Aliquando populi inter quos Lis erat, & contentio in aliorum Arbitrium compromittebant, ita Adrastus & Amphiaræus, de regno Argivo Eriphyæ iudicium subierunt, Ardeates & Anicini coram populo, Rex Numidiæ & Carthaginenses coram Senatu Romano, Parthi & Armenii coram Arbitris à Pompeio datis discebant.

3. Tertio Principum & populorum exterorum subditi aliquando ratione Loci quo quid admissum est, apud ordinarios territoriorum Iudices forum sortiuntur, ita olim Gallos & Castellanos de præda bello maritimo capta iudicium in Lusitania subisse narrat

Antonius

Antonius Gamma, sæpe Hispanos cum Hollandis, aliosque exteros de causis maritimis in curia Admiralitatis Angliæ, lites intentasse testantur Alberici Gentilis Advocaciones Hispanicæ.

4. Quarto de rebus inter diversos Principes & populos gestis, quantum ad famam, & existimationem attinet, penes doctos & prudentes est iudicium, itaq; cum Elizabetha Regina Angliæ de Maria Scota condemnata supplicio tradenda deliberaret, ne vitam tolleret inter alias ratio, ait Camdenus, erat Infamia apud posteros ex historiis. De causis & argumentis hujus generis quam plurimæ scriptæ sunt Disputationes & Decisiones ad justificandum & redarguendum præterita & ad futura fortassis dirigendum. Arq; ad hujusmodi judicia spectant, sequentes de Pace & bello Quæstiones.

Vid. 1. Bodinum l. 1. c. 7 nu 74. 2. Grotium. 12. c. 23. § 8. 3. Gammam De-
cis. 384. 4. Camdenum anno 1587.

An cum omnibus pacem habere liceat?

Natura, inquit Pomponius Jureconsultus, inter omnes homines cognationem quandam constituit, Jure vero cognationis alii aliis opitulari & benefacere tenentur, multo magis, quod Pax exigit, ab injuriis abstinere, & Genus humanum naturaliter bonum pacis appetere, inquit Augustinus, quia in hac vita mortali nihil potest esse jucundius, & utilius. Aristoteles autem ait, quosdã, Barbaros scilicet, factos ad serviendum, & Bellum esse contra eos, sicut venationem contra feras, & Philippus Rex Macedoniæ apud Livium, Cum alienigenis, inquit, & barbaris omnibus, Græcis æternum bellum est, Naturã enim quæ perpetua est, non mutabilibus in diem causis hostes sunt. Hominibus tamen cum hominibus à natura non est repugnantia, sed mores in concordiam vel discordiam eos inducunt.

Vid Gentilem l. 2. c. 12. Grotium lib 2. cap 20, § 40.

2. *Utrum à Pace an à Bello aliquando majus sit incommodum?*

1. **A**nnibal ex Italia reversus in Africam, Nulla inquit magna civitas quiescere potest, Si foris hostem non habet, domi in-
venit

venit, Et post finem tertii belli Punici, cum Cato delendam Carthaginem censuisset, Scipio Nasica servandam suasit, inquit Florus, ne metu æmula urbis sublato, Fœlicitas Romæ luxuriari inciperet. Itaq; Lydiis victis Cyrus arma, & equos ademit, iussitque cauponarias & ludicras artes exercere, & sic Gens industria quondam potens, & manu strenua, effœminata molliæ, luxuriæque virtutem pristinam perdidit, & quos, ante Cyrum, bella invictos præstiterant, in luxuriam lapsos otium & desidïa superavit.

Vid. Livium Decad. 3 lib 10 Florum lib 2 c 15 Justinum lib 1.

3 *Utrum Pax iniqua a quo bello sit preferenda ?*

M Lepidus in Gallia transalpina Imperator, missis ad Senatū Legatis, suadebat pacem faciendam cum Antonio, ad belli civilis incommoda evitandum, quam sententiam cum aliqui in Senatu probarent, Cicero dissentiens, Dulce, inquit, est nomen Pacis, & res ipsa cum jucunda, tum salutaris, Nam neque privatos fœcos, neque publicas leges, neque libertatis jura chara habere potest, quem Discordiæ, quem cædes civium, quem bellum publicum delectat, & nihil hoc cive, nihil hoc homine tetrius, si aut Civis, aut homo habendus est, qui Civile bellum concupiscit, sed hoc primum videndum est, an sit aliquod bellum expiabile, in quo pactio Pacis sit Lex servitutis. Idem in Epistola ad Atticum difficillimum hoc *σχεῖμα πολιτικόν* vocat. An cum Patria illegitimo imperio premitur, omnino danda sit opera ejus demendi, etiamsi eam ob rem Civitas in summum discrimen adducenda sit. Alibi tamen, animo sedatori, Mihi ait Pax omnis cum Civibus, bello Civili utilior videtur.

Vid. Cicero Philip. 13 lib. 9 ad Atticum Ep. 4. Grotium lib. 1 cap. 4. §. 19. Ayalam lib. 1 cap. 12. Ep. 4.

4 *An inter vicinorum arma Pax sit affeclanda ?*

Cum Romani primum Achzorum amicitiam peterent, & Cleomedon Philippi Legatus, mediam viam suaderet, & ut quiescerent, abstinenterq; armis. Aristæus eorum Prætor, eam non medi-

am

am, sed nullam esse viam ostendit, Etenim, inquit, præterquam quod aut accipienda, aut aspernanda est Romana societas, quid aliud quàm, (gratia nusquam stabili, veluti qui eventum expectaverimus, ut fortunæ nostræ applicaremus consilia) præda victori erimus? Itaque Portius Cato, Pompeio, & Cæsare inter se dissentientibus, quamvis à factionum authoribus multis in rebus reipub: causa dissentiret, & neutrius mentem plane probaret, eas partes sequutus est quæ plus æquitatis habere videbantur. Quæ vera sunt, cum alii aliis viribus sunt impares, æquales vero vel potentiores, à bellis vicinorum prudenter, & honestè abstinere possunt, ut Controversiarum Arbitri habeantur.

Vid. Livium Decad. 4, lib. 2. Aysalam lib. 1. cap. 12 nu. 17. 18. Bodinum lib. 5. cap. ult. nu. 588.

SECT. II.

De Quæstionibus Status inter eos quibus-
cum Pax est.

Quæstiones de Statu inter eos quibuscum Pax est, sunt, cum quaritur de Principis, vel Populi eorumve subditorum Conditione. An Status idem maneat, mutetur, an amittatur? &c

I Utrum Imperator Germanicus, etiam Romanus dici possit?

Iohaunes Bodinus ait, Germanos Romani Imperii nomen ad gloriam usurpare, & Costalius Jureconsultus, se nescire an sit, & ubi sit Romanum Imperium; immo Sleydanus Germanus natione, in oratione ad Carolum quintum sic ait. Quod quidem Imperium Romanum occidit, & dissipatum est, ut, & illa tria quæ ipsum præcesserunt. Nam & ad Orientem, & ad Occidentem Solem latissimè regnavit. Jam quicquid in Asia, quicquid in Africa tenuit, totum est amissum. aximam Europæ, & fertilissimam partem possedit, nunc autem ex illa veluti mole creverunt alia multa regna, prorsus ab ipso corpore separata, & nihil omnino reliquum est præter titulum & nomen, quod adhuc Germania retinet, ad quam

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postremo

postremo delata est potestas creandi Cæsaris, qui tamen adeo ex nulla parte, cum veteribus illis Romanis Imperatoribus conferri potest, ut ne sedem quidem avitam Cæsarum, & priscum domicilium, urbem Romam teneat. Romanum Imperium ad Germanicum devolutum, alii asserunt, Quod Jus Imperatoris Romani eligendi, semper penes populum Romanum fuerit, cum quis à Legionibus assumeretur, Populus Romanus eundem comprobavit; cum Constantinopoli habitaret Bizantini Quirites, qui cives erant Romani consensum præbuerunt. Demum cum Irene foemina, excæcato filio imperium Orientis occupaverat; Cives Romani indigne ferentes, Carolum magnum, qui suis armis Italiam pacaret, suis acclamationibus in Imperatorem cooptarunt, & à Leone tertio Pontifice Romano coronari voluerunt. Quo titulo ad ipsum ejusque successores, quæ Imperatoris Romani fuerunt, nec derelicta, aut ab aliis occupata, nec pactionibus, aut jure belli in aliorum dominium concesserunt, devenere. Cui convenit, quod in visione Danielis perhibetur, Monarchiam Romanam, quæ partim ferrea, partim fictilis erat, usque in finem mundi perduraturam. Nec obitare videtur, quod veteris Romani Imperii amplitudinem, & splendorem non retineant, ita enim Hieronymus, ex eo quod Pes imaginis definebat in digitis partim ferreis, partim luteis, interpretatus est Imperium Romanum, prius quidem robustum, & validum postea infirmum, & imbecillum, evasurum. Et licet maxima pars ejus, ab aliis occupata sit, totum tamen non extinctum est: Nedom deficit, quod alibi collocatum sit, quia ut Civitas non manibus continetur, ita nec Imperium certo loco ascribitur. Roma olim auspiciis Camilli Veis fuit, & Imperator Romanus mansit, postquam Constantino-poli sedem fixit.

Vid. Grotium lib. 2. cap. 9. §. 1. *Armanus Discurs. Politic. tom. 1. discurs. 2.*
Limnaum de jure publico lib. 1. cap. 4.

2 Utrum Dignitas Imperatoria pendeat à Coronatione Pontificia?

Mortuo Henrico Imperatore, Electorum alii Philippum ejus fratrem, alii Ottonem, Imperatorem elegerunt. Unde cum quæstio suborta esset, Legatus à Papa missus, Ottonis Electionem confirmavit, cumque Principes ex parte Philippi quærerent, quo

quo jure id ageret, rescripsit Pontifex Innocentius tertius, Principibus jus competere eligendi Regem in Imperatorem promovendum se agnoscere, cum jus hujusmodi ad eos ab Apostolica sede pervenerit, sed & Principes recognoscere debere, jus examinandi personam, ad Imperium promovendum, ad ipsum spectare, qui eum inungit, consecrat, & coronat. Adrianus vero Pontifex in Epistola ad Fredericum scribit, multo elatius. Qui Romanum, ait, Imperium, à Græcis translatum esse ad Alemannos, ut Rex Teutonorum Imperator non vocaretur, antequam ab Apostolico coronetur unde igitur, inquit, habet imperium, nisi à Nobis? Electione Principum suorum habet nomen Regis, ex Consecratione nostra habet nomen Imperatoris, Augusti, & Cæsaris. Ergo per nos imperat, & sicut Zacharias transtulit imperium à Græcis ad Teutonicos, ita nos possumus ab Alemannis transferre ad Græcos. Unde etiam Alciatus ait à Tempore Caroli Magni, Imperii Romani jus, & arbitrium penes sedem Romanam fuisse. Germani vero contendunt Imperatorem Electum, & ab Electoribus renuntiatum, vere esse Imperatorem, licet nondum habeat Pontificiam coronationem. Carolum Magnum à Populi suffragiis, non à Pontifice, cujus ad officium coronatio pertinuit Imperium accepisse. Regibus aliis à Regnorum suorum Archiepiscopis, vel Episcopis, ut plurimum, coronas imponi, nec tamen propterea iis regna debere. Multos Imperatores habitos, qui coronationem Pontificiam non habuerunt, utpote Maximilianum primum, Ferdinandum, Maximilianum secundum, Rodolphum, & Matthiam qui nunquam impetrarunt. Immo cum in Coronatione Pontificia Caroli quinti Imperatoris Bononiæ celebrata, Pons ingens super quem ingrediebatur, corrueret, Aliqui, uti refert Cornelius Agrippa, in omen vertentes vaticinati sunt, Nul- lum deinceps Imperatorem in Italia coronatum iri.

Vid. Cap. ven. rab Extr. de Electione Alciatum de formula Romani Imperii Aru-
meum Discurs. Polit. Disc. 3. Bisboldum de Præcedentia cap. 2. nu. 4.

3 *Utrum Imperator in Reges, & Principes alios Imperium habeat?*

Imperatori Reges, & Populos alios subiaci oportere tenent ple-
runque Itali, & ultra montani Jurisconsulti, cum qui Jus Canoni-
cum, tum qui Jus Civile profitentur. Canonici quod Deus fecerit

duo magna luminaria in firmamento cœli, id est instituit duas præcipuas Dignitates Papam, & Imperatorem. Quod Christus ad eundem finem dixerit Ecce Duo gladii. Quod ab Augusto Edictum exierit ut describeretur universus orbis. Legistæ quod Antoninus Imperator in rescripto ad Eudæmonem Nicomediensem dixerit Εγώ ων τὸ κτῆμα του Κυρίου. Ego quidem mundi Dominus. Quod in nonnullis locis Juris Civilis, omnia Principis, id est, Imperatoris esse dicuntur. Unde Bartolus audacter pronuntiat, Quod Hæreticus esset, si quis diceret, Imperatorem non esse Dominum; & Monarcham totius Orbis. Contrarium tenent, Doctores Citra montani, Imperatorem scilicet, nunquam fuisse Dominum totius Orbis, quod præcipuarum Monarchiarum temporibus fuerint etiam Reges, iis nunquam subditi: quod Imperatores Romani suas Constitutiones dirigant, omnibus aliquando Populis, sed qui suo subeunt imperio. Quod in Commerciis exercendis distinguunt eos qui Romano parent imperio, ab iis qui Regi Bersarum sunt subjecti. Quod alios etiam populos liberos agnoscant, cum quibus sunt jura Belli, captivitatis, & Postliminii. Quod etsi duo genera Potestatum, Ecclesiasticæ & Temporalis, Deus constituerit, non tamen iis duo duntaxat Capita suprema præfecerit. Quod Augustus Orbem describendum edixerit, & Antoninus se mundi dominum appellaverit, intelligendum esse, de Orbe Romano, & de ea parte Mundi cui Romani imperabant. Quemadmodum Ulpianus ait. cx constitutione Antonini, Qui in Orbe Romano sunt, Cives Romanos effectos esse, & Judæi dixerunt Hierosolimam in medio telluris sitam, id est, in medio Judææ, vel telluris quæ à Judæis colebatur. Denique quod Bartolus pronuntiando, eum qui aliter senserit hæreticum esse, non minus in eo hallucinatus sit quam ii qui decreverunt Hæreticum habendum esse qui Antipodes esse affirmaret.

Vid. *Glossæ* Catal. gler mundi parte 5. consid. 28. *Foreruviam* ad cap. *Peccatum* part. 2. §. 9. *Francis. a victoria* Relat. §. Sect. 2. et 3. *Grotium* lib. 2. cap. 22. §. 33. *Limma* um de jure publico lib. 2. cap. 8. *Arnifzum* de jure Majestatis lib. 1. cap. 2. ubi plene arguitur.

4. *Utrum Princeps, vel Populus, clientela, vel inaequali fœdere statum mutet?*

Clientes sunt sub Patrocinio, non sub ditione, ut Sylla apud Appianum loquitur, & Proculus, quemadmodum, inquit, Clientes nostros intelligimus esse liberos, etiam si neque auctoritate, neque dignitate, neque jure omni nobis pares sint, sic & eos qui Majestatem nostram comiter observare debent, liberos esse intelligendum est. Nec obstat quod aliquando Superiori, imperandi, Inferiori parendi vox tribuitur, quod contingit in negotiis communibus. Ira Thucydides, Decet eos qui in fœdere Principes sunt, circa suas quidem utilitates, nihil præcipuum sumere, at in communibus rebus curandis, eminere supra ceteros. Sæpe tamen accidit ut sub specie Patrocinii, & Fœderis inferiores superiorum imperio subjiciantur. Ita Thessalos in specie fuisse liberos, revera sub imperio Macedonum notat Polybius, & Latini querebantur, se sub umbra fœderis Romani servitutem pari. Quæ contingunt ex patientia, cum ad tutelam præsidia iuducuntur, & cum fœdus inæquale perpetuum factum est.

Vid. Grotium lib 1 cap. 3 nu. 21. Bodinum lib. 1. cap. 7 nu. 68. Aruseum de jure Majestatis l. 1. cap. 4.

5. *Utrum Princeps vel Populi Majestati deroget, Leges aliunde admittere?*

Sub initio Reipub: Romanæ, cum exactis Regibus, Populus incerto jure uteretur, placuit in Græciam mittere, qui inde afferrent Leges, quæ duodecem tabulis conscriptæ sunt. Et postea, cum maxime florebat Imperium sub Tiberio Claudio, ad regulandum negotia ad Nautas, & Mercatores commercia maritima exercentes, spectantia, à Rhodo insula petiti Leges Rhodiæ, quæ in corpore juris Civilis Romani insertæ sunt Aliis tamen nequaquam peregrinas Leges admittendas visum est, quia qui Leges alienas recipiunt, etiam alienum imperium agnoscere videntur. Itaque Senatus Parisiensis veteri decreto, & Philippus Bellus Edicto sanciverunt. Ne quis Romanorum Leges, majorum suorum, moribus & Le-

gibus opponerent, Et Reges Hispaniæ, sub capitali pœna vetuerunt, Romanorum Leges pro jure in regnis suis venditare. At vero subjectionis signum est, Principi, vel populo invito Leges externas imponi, haud ita ultro, & sponte admittere. Nec ferendum, utpote indignum, Patriis institutis & moribus Leges externas opponere & proinde Imperator Antoninus Leges Rhodias admittit, quatenus nulli legum suarum adversentur. At ubi jus proprium deficit, ibi honestum est ad alienum recurrere, quod Authores qui Consuetudines Feudales tradiderunt, concedunt, cum ita statuunt, Et si Leges Romanæ, non adeo vim suam extendant, ut usus vincant, aut mores; sicubi tamen casus emerferit qui consuetudine feudi non sit comprehensus, Peritus legum, absque calumnia lege scripta, id est jure Civili uti potest. Ita quamvis Lutherus Juris Pontificii libros, publicè combussit, in iis tamen Germaniæ dominiis, quæ Augustanam Confessionem amplectuntur, causæ Ecclesiasticæ, quæ religionem non concernunt, secundum Jus Canonicum etiamnum deciduntur. Et in Anglia post repudiatam Pontificis Romani auctoritatem Jus Canonicum, quatenus prærogativæ Regiæ Statutis, & Consuetudinibus regni non repugnat, approbatur, & ob easdem rationes Causæ militares in Curia Conestabilis, & Maritimæ in Curia Admiralli, quibus jus commune regni nõ sufficit, secundum leges Civiles Romanas terminantur.

Vid. L. 1. §. 4. *D. de Origine juris. Auctoritatem Legis Rhodiz apud Jacob. Gotofred in Comment. ad L. Deprecatio, D. de Lege Rhodia Rodinum lib. 1. cap. 8. n. 101. Chopptum de Domaniol. 2. nu. 5. Valentini Forsseri de Jure Canon. in Academiis Reformatis relinendo Statutum Hen. 8. M. Seiden. Dissertat. ad Fletam. cap.*

6. *Utrum Princeps in alium Principem in suo territorio imperium habeat?*

Cum Maria Scotorum Regina Proditionis accusata, judicio Delegatorum in Anglia morti condemnata esset, uti refert Camdenus, Erant boni rerum æstimatores qui asperius cum illa actum affirmabant, Eo quod fuerit Princeps libera, & absoluta, in quam solius Dei sit imperium; quod in Majestatem peccare non posset, quæ subdita non fuerit; quod Par in parem non habeat potestatem

statem unde Iudicium Imperatoris in Robertum Sicilia Regem irritum pronuntiatum est, quia Imperiò ejus nõ esset subditus. Alii aliter censebant, Illam scilicet, subditam esse, et si non originariam tamen temporariam. Quia Duo absoluti Principes quoad auctoritatem in uno regno esse non possunt; Parem in parem habere potestatem, quoties Paris iudicio se submiserit, vel expressè verbis, vel tacitè cõtrahendo, vel delinquendo, intra Paris scilicet Jurisdictione, & Papam sententiam Imperatoris in Robertum Siculum rescidisse, quod factum in territorio Imperiali non fuerit, sed Papali. Deniq; nullum magnum extare exemplum quod non aliquid ex iniquo habeat.

Vid. Camdenum *Eliza.* anno 1586 Eundem narrantem. *Rationes Legati Regis Gallie.* & *responsiones* eiusdem eodem anno. Vid. Gentilem l. 3. c. 8. de *Caroli Neapol.* regis sententia contra Conradum

7. *Utrum Idem Populus censendus sit, mutato imperio?*

Aristoteles, negat eandem esse Civitatem, Reipub: forma mutatâ, sicut inquit Harmonia non est eadem, ubi à Dorico modo transitur in Phrygium. An vero exolvenda sint nomina alia est inspectio, aliàs Politici, aliàs Jurisconsulti statuere possunt. Et sicut Legionis, una species est, qua regitur, altera qua militat, ita Civitatis una species est Relatio, partium inter se, quæ regunt, & reguntur alia consociatio juris, ex qua Idem erat populus Romanus, sub Regibus, Consulibus, & Imperatoribus.

Vid. *Grotium lib. 2. cap. 9. §. 3.*

8. *An mutatione Loci mutetur Populus?*

Si loco migraverit Populus, sive sponte, ob inedia, sive coactus, Populus idem esse uon definit, si vero discessio sit in Colonias, novus Populus nascitur, neque enim ut servi, sed ut pari jure sint, dimittuntur, inquit Thucydides.

Vid. *Crotium lib. 2. cap. 9. §. 7. & 3.*

9. *An Princeps subditum suum in territorio Principis alterius nobilitare possit?*

Cum Sigismundus Imperator Comitem Sabaudia, Lugduni Ducem creare vellet, Prætor Lugdunensis ei acerrime resistit, ita ut Imperator potestate sua liberè uti non potuerit, priusquam Regni Gallici fines excessisset. Et cum Carolus quintus Imperator, Hospitio admodum liberali in Gallia acceptus à Francisco Rege, ad petitionem dicti Regis nonnullos Barones, & Equites creasset, postea disputatum, & conclusum fuit, invalidum fuisse. Pro ratione affertur, quod Princeps extra territorium instar subditi habetur, nec potest jus Principis exercere salvâ alterius Principis dignitate. His tamen non obstantibus contrarium ex jure defenditur, Quod Princeps quoad subditos suos, in territorio Principis Amici, non desinit esse Princeps. quòd quæ sunt Jurisdictionis voluntariæ, extra territorium exerceri possunt, maximè, si (quod in facto Caroli quinti traditur) consentiente Principe territorii aliquid fiat.

Vil. Bédinum lib. 1. cap. 9. n. 201. Sleyden. Coment. lib. 12. Iohann. Nelden de nobilitate cap. 2. 184 L. 2. D. de Officio Proconsulis.

10. *Utrum subditus cuius ab externo Principe Honor delatus est eodem apud suos gaudere debeat?*

Thomam Arundellum de Wardour, bello Hungarico ad Strigonium contra Turcas præclarè meritum, Imperator Honorariis literis sacri Imperii Comitem, omnesque ejus posteros, & descendentes, Comites & Comitissas creavit. Cum ille reversus hoc honoris titulo apud vulgus inclaresceret, quæstio suborta est, An ejusmodi Titulus à Principe extero Regina inconsulta, collatus, esset admittendus. Erant qui censuerunt, Præmia virtutis, à quocunque Principe fuerint delata, admittenda: Virtutem enim flaccessere, nisi bene meriti præmiis excitentur. Henricum tertium Angliæ Regem Reginaldum Mohunum Somersfetti Comitem à Pontifice Romano creatum, agnovisse. Henricum octavum Roberto Cursono, quem ob virtutem militarem Maximilianus primus Imperator, Baronem sacri Imperii creaverat, adeo gratulatum fuisse, ut inter Angliæ Barones

rones ascripserit Barones autem Angliæ, hoc sibi & suis in honoris prærogativa fraudi futurum augurantes, ita contra argumentati sunt. Ejusmodi Titulos honorarios, nec à subditis accipiendos, nec à Principe admittendos, Solius Principis esse, suis subditis dignitates distribuere, juxta illud Valeriani Imperatoris, Ea tantum sit Dignitas quæ nobis jubentibus sustinetur, Principis Majestati, & subditorum obsequio multum detrahi, si Honores ab Exteris accipere permittantur. In Republica Veneta, & Genuensi, quicumque Ecclesiasticas Dignitates à Pontifice, vel Civiles à Principe externo accipiunt, tanquam suspectæ fidei homines, ad publica munera non vocari. Mohunum in Anglia pro Comite agnitum non fuisse, ex actis publicis constare, Henricum octavum, Cursonum pro Barone Angliæ ideo habuisse, ut umbratilem Baronis sacri Imperii titulum mature obrueret. Suffragium in Parliamentis non concessisse. Regina de his consultata distitavit, Ut mulieres pudicas, non in alium quam maritum, ita nec subditos in alium, quam quem Deus dedit, Principem, oculos conjicere decet, Nollem oves meas, alieno stigmati inuri, nollem alieni pastoris sibiulum sequi. Ex eadem ratione ante biennium Nicolaum Cliffordum, & Antonium Schirleium, quos Rex Galliarum in torquatum Sancti Michaelis ordinem asciverat, coegit Regina, ut resignatione facta, insignia remitterent, & curarent, ut ex ordinis illius Commentariis deleerentur. Quod cum audiret Rex Galliarum, dixisse fertur, ut Regina mihi parem gratiam reponat, Illa si videbitur, poterit aliquos ambitiosos Gallos, quos in Anglia proxime viderit, in Arthurianæ Mensæ rotundæ ordinem cooptare.

Vid. Camdenum anno 1596, & anno 1594.

11. *Utrum cum Idem Princeps duobus regnis præest, in altero regno natus, in alio jus Subditi obtineat?*

Cum Jure Communi Angliæ, Extraneus, vel extra regnum natus, hæreditatem in terris, vel fundis intra regnum acquirere non posse contigit, quod postquam Jacobus Rex Scotiarum, Elizabethæ in regno Angliæ successit, Robertus Calvinus in regno Scotiarum natus, hæreditario jure, pro terris quibusdam in Civitate

Londinensi, contra Johannem Bingley actionem institueret, cui Bingley pars adversa objecit, Quod Calvinus esset Alienigena, quippe natus in regno Scotiæ, intra Ligeantiâ Domini Regis regni Scotiæ, & extra Ligeantiam Domini Regis regni Angliæ, & proinde nec terrarum infra regnum Angliæ hæredem esse, nec pro iisdem actionem intentare posse. Pro Bingley arguebatur, quod etiam si utrumq; regnum Angliæ, & Scotiæ Jacobo Regi subiceretur, Duo tamen regna distincta, & diversa fuisse, & esse. Utrumque regnum proprias Coronas proprias Leges, propria, & distincta sigilla obtinere, & pro fundamento habebatur, Quod quando duo jura concurrunt in una persona, æquum est, ac si essent in diversis. Pro Calvino afferebatur, Quod ex monumentis Juridicis Angliæ apparet, cum iidem essent Reges Angliæ, & Duces Normanniæ, & Aquitaniæ, quæ etiam diversis legibus & moribus utebantur, subditos Ducatum hæreditatum in Angliâ capaces fuisse, & idem jus subditis in Hibernia, & insulis Gernsey, & Jersey natis, etiamnum sine controversia competere. Itaque pro jure Calvini Cancellarius, & duodecem Judices, omnes scilicet duobus exceptis, pronuntiarunt. De quibus duobus Cancellarius dixit, quod sicut Divi Thomæ dubitatio, occasionem præbuit, firmitus credendi resurrectionem Christi, ita eorum (quibus idem etiam fuit prænomen) hæsitationem, aliis majorem hujus sententiæ confirmandæ ansam exhibuisse.

Vid. Cancellarii Egerton Orationem in Camera Saccarii. Cook Report. lib. 7.

12. *An Civi, vel subdito Patriam aut Civitatem, venia non impetrata, deferere liceat?*

Scimus, inquit Grotius Populos esse ubi idnô liceat, ut apud Moschos, nec negamus, talibus pactis iniri posse societatem; & mores vim pacti accipere, At nos, quid naturaliter, si nihil aliud convenit, obtinere debeat, querimus. Et sani gregatim discedi non posse, satis expeditum est. Nam id si liceat, jam civilis societas subsistere non possit. De singulorum discessione alia res videtur. De sua cuique civitate statuendi facultas libera est, ait Tryphonius Jureconsultus, & Cicero pro Balbo laudat jus illud, Ne quis in Civitate maneat invitus, & fundamentum vocat libertatis, sui quemque juris, & retinendi, & detinendi esse Dominum. Tamen hic quoque servanda

servanda est regula naturalis æquitatis, ut id non lic eat, si societatis interfit, semper enim, ut rectè inquit Proculus, non id, quod privatim interest unius ex sociis, servari solet, sed quod societati expedit. Interest autem societatis civilis, non abire civem, si contractum sit magnum æs alienum, nisi paratus sit Civis in præsens partem suam exolvere. Item si fiducia multitudinis bellum sit susceptum, præsertim si obsidio immineat, nisi paratus sit Civis ille alium æquè idoneum substituere, qui rempublicam defendat. Extra hos casus credibile est, ad liberam civium discessionem populos consentire.

Vid. Grotium lib 2. cap. 5. §. 24.

13. *Utrum Idem duarum Civitatum simul Civis esse possit?*

Cicero in Oratione pro Cornelio Balbo, Mira-inquit præclara atque divinitus, jam à Principio Romani nominis, à majoribus nostris ratio comparata est. Ne quis nostrum plusquam unius Civitatis civis esse possit, Dissimilitudo enim Civitatum, varietatem juris habeat necesse est. Idem vero Cicero secundo de legibus ait sibi & omnibus Municipibus duas esse patrias, unam Naturæ alteram Juris, Catonis exemplo qui Tusculi natus in Populi Romani societatem susceptus est. Quod & Jureconsultorum sententiis confirmatur: ita Paulus, Senatores sic & in urbe Domicilium habere videantur, tamen, & ibi unde oriuntur domicilium habere intelliguntur. Et Imperator Antoninus Silvano. Cum te Biblum origine, incolam autem, apud Berytios esse proponas, merito apud utrasque Civitates muneribus fungi compelleris. Quibus respondetur, Quod Cicero Municipibus duas patrias esse concedat, & Leges duo Domicilia in diversis civitatibus largiuntur, Id obtinuisse in Municipiis Romanæ ditioni subditis, cum altera Patria, vel Civitas alteram contineat. Vel cum sint ejusdem Principis, ut Biblon, & Berithon fuerunt ejusdem Provinciæ, Phœniciæ scilicet. Et inducitur, ut qui in diversis locis facultates haberent, in iisdem ad subeunda munera tenerentur, non ita receptum, cum quis in exteram Civitatem, extero Populo, aut Principi subditam se transferret, aut cum de privilegiis Civilibus ageretur, Quam distinctionem comprobatur Baldus Perusinus, qui ait, Perusinum, id est Perutii natum, qui senis, aut Florentiæ habitat non deferere Originem, quod in eadem

dem Provincia sint Perusium, Senæ, & Florentia; Cum autem in exteram provinciam quis se transtulerit, deferitur Regio, mutatur Civitas, & alteri Provinciæ, & Civitati persona dicatur.

Vid. Jean Pacquet *traictat. de Droict de Auben* cap. 39 & 41. in *causa inter Cinnamium & Longovallium*. L. *Senatores* D. de *Senator*. Lorg. 1. C. de *Municipibus* Bald. ad *Auth. omnino* C. Ne *uxor pro marito*. Grotium lib. 2. cap. 5. §. 24

14. *Utrum qui in regno externo diu moratus est, & familiam contraxit, patria in qua natus est renuntiasset censendus sit?*

Iohanne Cenamio in Gallia defuncto, Johannes Longovallius, jure Isabellæ Dasineræ uxoris cognatæ & Legatoris, in testamento defuncti, hæreditatem adiit. Post aliquot annos pro jure Pandolphi Cenamii fratris Johannis contra Longovallium de hæreditate Lis est instituta. Contra jus Pandolphi excepit Longovallius, quod etsi ortus quidem esset Lutetiæ, Venetiis tamen ultra triginta annos moratus, ibi domicilium constituerat, uxorem duxerat, liberos susceperat, & proinde omni jure Subditi, in regno Galliæ exciderat, Quia ibi Municipis fiunt, ubi in Civitatem recepti, quod, ut inquit Tacitus, Alienigenis per connubia sociatis, regio in quam venerunt patria est; & Propheta Ezechiel dixerit, Advenæ qui accesserint ad vos & genuerint filios in medio vestrum, erunt vobis sicut indigenæ. Pro Pandolpho contendeatur, quod etsi diu Venetiis egerit, Originis, atque adeo Naturæ jura retinuerit, quod auctore Cicerone, Nemo civitatem amittat nisi author sit, Imo, pro ut Imperator Diocletianus, Nemo sua quidem voluntate Civitate originis se eximere possit. Pandolphum Venetiis commorantem, nunquam Civitate donatum fuisse, Et Cives fieri non posse, nisi in Civitatem allesti sunt, ut Romæ agentes, nisi jus Romanæ togæ acceperint, De Consuetudine Galliæ Peregrinum, quantumvis longo tempore, in regno vixerit, juris Civilis regni capacem non esse, nisi gratia, & Codicillis Principis indultum fuerit. His respondit Longovallius, Authorem aliquem sibi fieri amittendæ Civitatis, ex sententia ejusdem Ciceronis, non solum eum qui deliquerit, sed & qui propria civitate rejecta, alteri se dicaverit, quod Civis Romanus coram Nerone, ut est apud Tranquillum, Peregrinitatis arguebatur, quod Civitatem sua sponte, & absque delicto rejecisset. Arborem nostram,

nostram, quæ in fundo alieno radices egit, mutare dominium, nostram esse desinere, & alieno solo cedere. Quod Romæ necessaria fuerit togæ impetratio, & in regno Galliæ, Literæ quæ Naturalitatis appellantur, propter locorum præstantiam, vel singularem rationem, introductum, Apud alias nationes nominatim allegere, aut Civitatis jura donare, non esse in usu. Hæc & alia argumenta pro se, & adversario à Longovallio Advocato Parisiensi referuntur, Præpositus tamen Parisiensis pro Cenamio sententiam tulit, quam Curia Parlamenti, ad quam Longovallius appellavit, confirmavit. Bacquetus specialibus rationibus iudices motos tradit, nec eorum sententias in hoc casu, pro jure generali habendas. Fortassis vero id respexerunt, Quod quamvis Incolatus, & Domicilium in externo regno, sufficiunt, ad constituendum aliquem subditum Jurisdictioni & præstandis muneribus obnoxium, non tamen sit satis ad constituendum Civem, ut eorum Privilegiorum civilium sit particeps, quæ in regno natis competunt, nisi specialis allectio supervenerit. Quod non solum Romæ, & in Gallia, sed & alibi observatum. Ita Cicero, Jure nostro Civitatem mutare quisquam potest, modo asciscatur ab ea civitate, cujus esse se Civitatis velit, uti si Gaditani sciverint nominatim, de aliquo cive Romano, potestas est ei mutandæ civitatis, & Plutarchus refert, Solonem exilio pulsos, & qui sponte Athenas advenissent, Civitati ascripsisse, cujus allectionis instar est, si qui ad Honores admittantur. Quod Romanis quibusdam contigisse testatur Cicero, qui inter Areopagitas, certa tribui, certo numero, ignari periculi amittendæ civitatis Romanæ confidebant. Peritior vero Pomponius Atticus, qui in ea civitate diu moratus est, ex ea veroratione honores oblatos fuscipere noluit.

Vid Bacquet du Droct, de Aubein cap 41. Eguntarium Baronem Coment post leg. ult. D de statu hominum.

15. *An qui in regno externo natus est, à paterna origine jus subditi consequi debeat?*

Maria Mabilia, Gallis parentibus, in Angliâ nata, pro parte bonorum Adenettæ de Valle, aviæ, quæ Parisiis mortua est. Johannem Vilanum filium, & hæredem in jus vocabat. Vilanus excepit, quod nata esset in Angliâ regno externo, & proinde cum esset peregrina

peregrina, ad succedendum in Gallia, nullum jus haberet. Responsum pro Mabilia, & si in Anglia nata esset, ex Gallia tamen, ubi parentes nati, oriundam, & quod etsi non propria Origine, tamen paterna jus succedendi in Gallia ei competere, præsertim cum in Galliam venisset animo manendi, & constituendi Domicilium, quod Regiis literis comprobatum erat. Paternam Originem ei sufficere multis juris Civiles autoritatibus confirmari, ita Ulpianus, qui ex duobus Campanis natus est, Campanus est, & Filius Civitatem, ex qua Pater ejus naturalem originem ducit, non Domicilium sequitur. Et pro accessu in Galliam idem Ulpianus apud hostes susceptus filius, si postliminio redierit filii jura habet. Replacatum ex parte Visani, Galliam non esse subjectum Juri Civili Romano, de Consuetudine, & Lege Peregrinaria-vulgo d'aube in, respici ortum, aut nativitatem non gentem, aut genus, unde Liberi nati in Gallia succedant parentibus peregrinis, ibi defunctis, quod non liceret, si originis parentum, non liberorum, ratio haberetur. Natos apud Hostes postliminium habere, quia Parentes capti apud hostes nullum jus acquirunt, quod Parentes Mabilia in Anglia, ubi per viginti annos morati fuerunt, consequuti sunt. Sententia tam in prima, quam in secunda instantia, pro M. Mabilia lata. Quod parentibus Gallis oriunda, in Galliam animo ibi manendi venerat, auctoritate Decisionis Boerii, Burdegalenſis, qua determinatum, quod filius in Hispania conceptus, & natus à patre & matre Gallis, qui in Hispaniam perpetuæ moræ causa migrarant, reversus in Galliam, ad Domicilium paternæ Originis, animo ibi manendi, ad Retractum, id est, ad redimendum possessiones à Patre venditas, secundum Consuetudinem Galliæ admitteretur. Quia Origo paterna juncta cum Domicilio à filio acquisito, potior propria Origine maxime in materia favorabili haberetur.

Vid. Bacquet, trad. D'Aube in part 5 chap. 39. Boerium Decisione 13. Matth. Afflât Decis. Neapol. 384. Steph. Bertrand, confil. 157 uu. 16. vol. 3. corn. confil. 177. vol. 4.

16. *Cujus subditus sit qui à suo populo deditus, ab altero receptus non est?*

MAnenius, ob pacem cum Numantinis minus legitime factam à Romanis deditus est, Is, cum à Numantinis receptus non esset, Romam rediit, & Senatum introiit, unde Pub. Rutilius Tribunus plebis eum educi jussit, quod Civem Romanum esse negaret, quem Paterpatratus dedidisset. Aliis visum est Manenium, cum ab hostibus receptus non sit, Civem mansisse. quod etiam Ciceronis probatur, Deditum ei dici non posse, qui acceptus non sit, nam neque donationem, neque deditionem sine acceptione intelligi. Alii secundum Tribunum plebis opinabantur, quod Civis esse definit, quem Civitas repudiavit, licet ab hostibus non sit acceptus, non secus quam is cui aqua, & igni interdictum est, vel qui in insulam deportatus est. Cui sententiæ Modestinus Jureconsultus videtur accedere, qui respondit, Hostibus deditum, & reversum, nisi esset à suis receptus, Civem non esse, quod videtur verius, quia refert Pomponius, de Mancino legem latam, esse, ut Civis Romanus esset, quæ superflua, si alia civis mansisset.

Vid. *Ayalam lib 1 cap. 15 nu. 24. L. 4. D. de Captivis ult D. de Legationibus,*

17. *Utrum Profugus qui in alterius Principis, obsequium transiit Patriæ Legibus teneatur?*

Iohannes Storius Anglus profugus, in navem, quæ libros Hæreticos, in Belgium intulisse dicebatur illectus in Angliam abductus est, ubi Majestatis postulatus, quod Angliam invadendi rationes monstrasset, Legibus se submittere recusavit, quod Anglia deserta, in obsequium Regis Hispani se tradidisset, verum ex sententia Jurisconsultorum damnatus, & proditorum supplicio affectus est. quandoquidem Nemo patriam in qua natus est exuere, nec solum natale, aut Principem pro arbitrio ejurare possit, secus fortassis statuendum si Storius ab Anglia in exilium pulsus fuisset, cum exul si alterius potestati se subiciat, ab eoque acceptus sit, prioris imperio non teneatur.

Vid. *Camden anno 1571. Bodin. lib. 1. cap. 6. num. 59. Grotium l. 2 c. 5 nu. 25.*

S E C T.

SECT. III.

De quaestionibus Dominii inter eos
quibuscum Pax est.

Quaestiones de Dominio inter eos, quibuscum Pax est, sunt, veluti de Occupatione, Praescriptione, jure magis probabili, translatione, & Successione.

I. *Utrum Immissione jaculi rei possessio acquiri possit?*

Andrii, & Chalcidenses, novarum sedium quærendarum causa, in Thraciam profecti, cum iis renuntiatum esset, Barbaros, Acanthum deseruisse, miserunt speculatores, à quibus fuga & solitudine intellecta, cæpere cursu contendere, uter Populus urbem pro derelicta habitam, prior occupando acquireret Chalcidensis, cum vinceret pernicitate, Andrius vibravit hastam, quam portæ urbis infixit, Ille exclamavit. se jaculo, Chalcidensis contra se corpore prævertisse. Hinc itaque orta dissentione, arbitros cepere Parios, Samios, & Erythræos. Dicebant Andrii rei derelictæ possessionem, non necesse esse corpore apprehendere, solis oculis, affectuque solo posse apprehendi, atque hic amplius telum immissum, itaque juste possedisse, si enim furculo defringendo, jactu lapilli, festucae traditione possessio acquiratur, cur non hasta projecta? Chalcidensis contra contenderunt, aliud esse, possessionem ab alio traditam, hoc, aut illo modo nancisci, aliud rem sine traditione occupare, quamdiu enim ab alio non tenetur, fieri posse occupantis, quemadmodum, si quis feram vulneravit, non prius ejus Dominus habetur quam eam naturaliter ceperit, multa enim accidere possunt, ne capiat, ita attacta porta, potuisse accidere, ne qui jacuisset, urbe potiretur. Pro Andriis tamen pronuntiatum à majori parte, nam pro iis censuerunt Samii, & Erythrai, pro Chalcidensibus duntaxat Parii uti refert Plutarchus.

Vid. *Æroditæ rerum judicat lib 5. tit. 21. cap. 1.*

2 *Utrum*

2. *Utrum Mare occupari possit?*

Vlpianus Jureconsultus Mare omnibus patere dicit, & Celsus, Maris usum omnibus communem esse. Paulus tamen affirmat, si maris jus proprium ad aliquem pertineat, ubi possidet is actionem ei competere. Ut imperium in mari occupetur, jus gentium non obstat in confesso est, inquit Grotius, ita Dion Cassius dixit, Mare omne quod Romani est imperii, & in induciis annalibus belli Peloponesiaci permittitur Megarensibus, nauigare mari, quod ad ipsorum, sociorumque terram pertinet, imò plus concedit. Ubi idem Princeps regiones utrinque mari adjacentes obtinet quod contigit in freto Britannico cum Rex Angliæ esset Dux Aquitanix, & Dominus complurium locorum juxta mare. Morisotus vero affirmat Reges Angliæ etiam si Gasconix, & Aquitanix Duces, & Domini erant, eos tamen Regem Galliæ in iis partibus superiorem agnovisse, unde quavis Maris Aquitanici, & Normanici usus & emolumentum penes eos fuerit. Jurisdictio & principale dominium penes Galliæ reges mansit. Johannes vero Tilius, lib. secundo de rebus Gallicis, ingenue fatetur Galliæ Reges nullum imperium in Mari habuisse, cum regnum partitionibus imminutum, & Reges in ditiones angustiores contracti essent. Eo quod potentes vasalli, feuda summa cum imperio, si fidem exceperis, obtinebant. Rex enim Angliæ, inquit, tenebat Ducatus Normanniæ, & Aquitanix, Britannix suus Dux erat, & Flandriæ, Tholosæ, Provinciæ Comites.

Vel Grotium lib. 2. cap. 3. §. 13. & plene in annot. ad eund. Morisotum Orbis Maris 4. 2. c. 19. Grotii Mare liberum Gultel. Welwood contra Grotium Mare clausum Iobannis Seideni.

3. *Utrum ad littuseicla Principibus, vel territorii Dominis occupare liceat?*

Imperator Constantinus Augustus, ita statuit. Si quando naufragio navis expulsa fuerit ad littus, vel si quando aliquam terram attigerit. ad Dominos pertineat, Fiscus meus se non interponat, Quid enim jus habet fiscus in aliena calamitate ut de re tam

luctuosa fectetur compendium ? Jure tamen posteriori , vel potius prava Consuetudine, obtinuit, ut qui territoria mari adjacentia possident, bona naufragorum cum subditorum, tum exterorum, ad litus appulsâ, diripiant. Ita cum Legatus Cæsaris , coram Henrico secundo Francorum rege questus esset, duas naves ad litus ejectas ab Jordano Urfino captas esse , easque restitui postularet, Annas Momoratus Magister Equitum, respondit, Ea quæ ad litus ejecta fuissent, gentium omnium jure ad Principes qui Littoribus imperearent pertinere. Renatus Choppinus refert, in Sicilia, Littoribus Italicis, & in Anglia naufragiorum compendia, inter regalia numerari. Sed & Britonum Duci idem jus competere , Cum enim Armorici Principes, scopuloso & importuoso littore , crebra naufragia fieri prospicerent, edicto statuerunt, ne temere freto se committere cuiquam liberum esset, unde Brevicula navigatoris (maris & littorum peritis prius consultis) à Ducibus dabantur, quem Commeatum si qui contemnerent, naufragio facto eorum, navium quod supererat, & merces publico committebantur. Quod in subditorum præjudicium, à Principe , non sine ratione induci potuit, nec tamen ad exterorum bona jus aliquod tribuere.

Vid L 1 C de naufragiis. Bodinum lib 1 1. cap ult. nu. 17 1. Choppinum de Dominio lib. 1 cap. ult nu. 10.

4. An urbs de novo condita cedat Regioni ?

Iudæi, & Syrii coram Nerone, de urbe Cæsarea contendebant, Dicebant Judæi, conditam esse ab Herode, eoque Herodem Judæos deduxisse, itaque esse Judaicam: Syrii contra in regione Syria esse conditam, & Herodem magis protulisse & accrevisse , quam condidisse. Cum enim antea Turris Stratonis, appellaretur & à Syrii incoleretur, Herodem Cæsaream nominasse , mutasse veterem appellationem, non veteres Colonos, nec credibile, quod eo animo ædificarat, ut Judæis ascriberet, quod in Cæsarea templa, & in templis imagines posuisset, quæ apud Judæos non permittuntur. Quibus rationibus commotus Cæsar eam ad Syrios pertinere pronuntiavit.

Vid, *Ærodiæ verum judicat. lib. 1 tit. 21. cap 7.*

5. An

5. *An De Dominio & jure, ex conjecturis statuere liceat?*

Cum inter Athenienses & Megarenſes de inſula Salamine ſumma eſſet contentio, Critolaide, Amomphoreto, & Cleomene, Lacedæmoniis ſumptis arbitris, pro Athenienſibus Solone, pro Megarenſibus Herea, cauſam dicentibus, Inſulam Athenienſium eſſe pronunciatum eſt. Quod qui inſulam habitabant in ſepeliendis mortuis, ritum Athenienſium, non Megarenſium ſequerentur, cum haberent ſepulchra ad Orientem poſita, corpora ad Orientem Solem converſa, inſculptaque familiarum nomina, quorum adhuc moribus utebantur. Non diſſimile fuit de Mona, ſive de Mannia Inſula iudicium, de qua, uti tradit Giraldus Cambrenſis, cum medio libramine, inter Boreales Hiberniæ, & Britanniæ partes porrecta eſſet, utri terrarum applicari de jure debuerit, ab antiquis non mediocriter ambegebatur. Demum in hunc modum Lis quievit, Quippe cum Hibernia venenofa animalia non ferat, compertum eſt, hanc Inſulam vermes venenofos, periculi cauſa adveſtos, admiſſiſſe, itaq; Britanniis applicandam communis cenſura dictavit.

Vid. *Erodiū lib. 2. Decret. tit. 46 c. 3. Camdenū in Britanniā, de Inſula Mannia.*

6 *An ex titulo antiquo nova poſſeſſio ſit decernenda?*

Cum inter Athenienſes, & Mitylenæos de Sigæo oppido, quod in Ilienſi agro erat, eſſet contentio, tandem in Periandrum arbitrum convenere Mitylenæi antiquum Dominium repetebant, quia conſtabat Athenienſes oppidum Piſtrato Duce à Mitylenæis armis eripuſſe, Athenienſes contra aſſerebant, ſibi & cæteris Græcis qui Duce Agæmnone Menelao de raptu Helenæ operam navarent non minus quam Mitylenæis in agrum Ilienſem jus competiſſe. Itaque Periandro placuit, ut uti quiſque quid obtineret, ita poſſideret.

Vid. *Erodiū Decret. lib. tit. 52 c. 1. Eundem ibid. cap. 2. & 3. Diſſertationem Ducis Neverneſis ad Regem Galliæ apud Tbuanum lib. 59 anno 1574.*

An de Dominio inter alios Arbitri pro suo jure pronuntiare possint?

A Ricini atque Ardeates de agro juris ambigui populum Romanum Judicem cepere, Concilio populi à Magistratibus dato magna contentione actum est, jamque editis testibus, cum Tribus vocari, & populum inire suffragia oporteret, Publius Scaptius confurgit, & contra auctoritatem Consulum, Tribunis faventibus, ita fatur, Annum se tertium & octogesimum agere, & in eo agro, de quo agitur militasse, non juvenem, sed vicesima jam stipendia merentem, cum ad Coriolos sit bellatum, memoriae suae infixum agrum de quo ambigitur, Coriolonorum fuisse, captisque Coriolis, jure belli publicum populi Romani factum, mirari se, quonam more, Ardeates, Aricinique, cujus agri jus nunquam usurpaverint, incolumi re Coriolana eum se, a populo Romano, quem pro Domino Judicem fecerunt, intercepturos sperant; Consules cum Scaptium non silentio modo, sed cum assensu audiri animadvertissent, Deos hominesque testantes flagitium ingens fieri, Patres primores accersunt, cum his Tribunos circumeunt ne pessimum facinus, peiori exemplo admittant; Judices in suam rem litem vertendo, cum praesertim nequaquam agrum intercipiendo tantum acquiratur, quantum amittatur, alienando injuria sociorum animos. Nam fama, quidem ac fidei, damna majora esse, quam aestimari possint, Haec & alia Consules vociferantur, sed plus Cupiditas, & anthor Cupiditatis Scaptius valuit, vocata Tribus judicaverunt, Agrum populi Romani esse, nec abnuitur ita fuisse, si ad alios Judices itum foret, Nunc haud sane inquit Livius, quicquam bona causa elevatur dedecus judicii, idque non Aricinis, atque Ardeatibus, quam Patribus Romanis fœdus, atque acerbius visum. Acerbius & fœdus quod Philippus Rex Macedoniz egit, qui cum fratres duo Thraciz reges de terminis ambigentes disceptationum suarum judicem ipsum elegerissent Philippus ad judicium velut ad bellum inopinantibus fratribus, instructo exercitu venit, & utrumque regno de quo contendebatur, spoliavit, Omnes, inquit Curtius, Principes sani docent, Concordiam maximum, ad conservanda imperia, atque principatus stabilien- dos, adminiculum esse.

Vid. Livium lib. 3. insue, Dionys. Halicarn. lib. 11. Quint. Curtium lib. 1.

Utrum.

7. *Utrum inter diversos Principes procedat usu-capio, vel Præscriptio?*

Cum Antiochus à Romanis repeteret urbes quas ipse Pater vivus nunquam usurpasset, objiciebant Romani possessionem centum annorum, quo spatio, tres generationes hominum continentur. Vasquius tamen negat, jus usucapiendi quod Lege civili introductum est, inter diversos Reges, aut Populos locum habere. Quod si admittatur, sequetur magnum incommodum, ut controversiæ de Regnis & Regnorum finibus, nullo tempore extinguantur. Itaque Lacones apud Isocratem, tanquam certissimum, & apud omnes gentes confessum ponunt. Possessiones publicas, non minus quam privatas, multo tempore ita firmari, ut revelli nequeant, cum ex longo tempore derelictio præsumatur.

Vid. Grotium lib. 2. cap. 4. §. 1, &c. Gentium lib. 1. cap. 2. 2.

8. *Utrum jus in Regna Occidentis, ad Romanum Pontificem, ex Donatione Constantini transfatum sit?*

Sunt qui referunt, cum Constantinus Imperator gravi morbo Lepre laboraret, nec Medicorum opera sanari posset, Sacerdotes Ethnicos suasisse, ut cisternâ calido infantium sanguine impletâ lavaret, in quem finem cum multi adducti essent, & Sacerdotes parati ipsos jugulare, Imperatorem rem nefandam exhorruisse. Eademque nocte, Petrum & Paulum Apostolos, ei comparuisse, & denuntiasse, se à Christo missos ut monerent, à Sylvestro Episcopo Romano Religionem Christianam, & sacrum baptismum suscipere; Quod cum fecisset ipsum sanatum, & mundatum sensit, ideoque Sylvestro, ejusque successoribus urbem Romam, Italiam, omniaque in Occidente regna, in perpetuum donasse. Ad cuius relationis fidem confirmandam asseritur. Hujus donationis caput, in prima parte Decretorum insertum, ejusque capitis auctoritatem, non solum ab Innocentio & Canonistis, præcipue à Cardinale Alexandrino probatum, sed etiam à Legistis, Bartolo, Baldo, Cyno, & aliis, multis in locis usurpatam. Totius integrum exemplum à Græco Codice in Bibliotheca Vaticanâ à Bartholomæo Pierno

Latine editum, & Julio secundo Pontificis dicatum extare. Alii qui rem solertius indagarunt, observant illius temporis scriptores Ecclesiasticos, Eusebium, Hieronymum, Basilium & hujus famigerati monumenti nullam mentionem facere. Platinam, qui omnia instrumenta, ad statum Ecclesie in temporalibus pertinentia collegit, nihil hujusmodi recordari, Constantinum Religionem Christianam ante Sylvestri Pontificatum amplexum fuisse, ita Papa Melchisedes refert, eumque ab Episcopo Nicomedienſi in Jordano baptizatum, ut alii perhibent, Ejus filios tam in Occidentali, quam in Orientali imperio successisse, aliosque Imperatores Romam, Ravennam, aliasque Italiae Provincias, tercentum annos, post Constantinum, (quod etiam ex Pontificum reſcriptis liquet) possedisse, quod caput in Decretis, uti testatur Antoninus Archiepiſcopus Florentinus, in antiquioribus, Decretorum Libris repertum non sit, nec a Gratiano insertum, sed ab alio qui ut multa alia, ita & hoc quasi incertae fidei sub notatione Paleae designavit. Credibile Canonistas, & Legistas Italos, ob reverentiam Dignitatis Pontificiae favorabili errori, aliquid indulgisse, Exemplar graecum Picerus in vaticano nusquam extare, multis compertum esse. Denique Nicolaus de Cusa Cardinalis, & Pius Pontifex hanc donationem tanquam commentum egregium confutarunt, & Laurentius valla, Patritius Romanus, & Pontificius, Constantinum nec hujusmodi Donationem fecisse, nec facere potuisse, nec Pontifices Romanos, jus aliquod ex ea percepisse, multis argumentis, copiosa, & Eleganti oratione differuit.

Vid. *Pro Donatione Cap. Constantinum Destinēt Canonistas & Legistas apud Cathalanum.*

Barthol. Picerum de Privilegio Constantini Contra Ultricum Hutennum, Epist. ad Leonem Decium Hieronymum Cathalanum, Nicolaum de Cusa, Laurentium valla de Donatione Constantini.

9. *Utrum ſus ad Indorum regiones Hispano ſoli comperat?*

Cum Franciscus Dracus anno 1580. Orbe circumnavigato, in Angliam rediſſet, Bernardinus Mendoza Hispani in Anglia Legatus,

Legatus, In Oceanum Indicum ab Anglis navigari, conquestus est. Responsum tulit a Regina *Elizobetha*, illam non intellegere, cur sui, & Principum aliorum subditi, ab Indijs prohibeantur, quas Hispanici juris esse persuaderi sibi non possit, ex Pontificis Romani Donatione, in quo Prærogativam in huiusmodi causis agnovit nullam, nedum authoritatem, ut obligaret Principes, qui illi Obedientiam nullam debent, ut Hispanum novo illo orbe quasi infeudaret, & possessione investiret, nec alio quopiam jure, quam quod Hispani, hinc illinc appulerint, casulas posuerint, flumen, aut promontorium denominaverit, quæ proprietatem acquirere non possunt, ut hæc rei alienæ donatio, quæ ex jure nihili est, & imaginaria hæc proprietas ob stare non debeat, quo minus cæteri Principes, Commercia in illis regionibus exerceant, & colonias ubi Hispani non incolunt, jure Gentium nequaquam violato deducant, cum Præscriptio sine possessione non valeat.

Vid. *Camænum* Eliz. Anno 1581. *Grotium* *Maris Liberi*, cap. 13. *Nolden* de *Nobilitate*, cap. 2. nu. 56. & seq.

10. *E Regum filiis, uter in successione præferendus sit, qui ante adeptum regnum, an qui postea natus est?*

Cum Ottoni primo Imperium delatum esset, Henricus ejus Frater, suavis Comitis Palatini, Lotharingæ Ducis, aliorumque Principum, armis vindicabat; Quod Regnum sibi in Patris regno nato, potius quam Ottoni ante regnum adeptum nato, deberi videbatur pro filio post regnum adeptum nato, assertur. Quod cum inter Artabazen, & Xerxem filium Darii Histaspis, de Persiæ Regni successione contenderetur, Demaratus Spartanus, regno ejectus, tunc forte præsens, dixerit, filium post adeptum regnum, alteri antegenito præferendum, atque ob hanc causam regnum Xerxi adjudicatum fuisse. Quod etiam Guicciardinus obtrunxisse scribit, in contentione de Ducatu Mediolanensi, inter Ludovicum, & Baleatium fratres, quorum hic ante adeptum à Patre Ducatum, ille post adeptum, natus fuerat. E contra, cum post Darii mortem hæc eadem controversia inter Articam Dario Prionto, & Cyrum eodem rege jam facto, natum exorta esset, & Praxitidis mater,

ter, in Cyri gratiam, veterem illam Xerxis disputationem urgeret. Persæ tamen Arsicæ regnum adjudicarunt, & Herodes rex Judæorum Alexandro, & Aristobulo ex se post adeptum regnum, Antipatrum ante natum prætulit, pro qua parte etiam in pugna inter Ottonem, & Henricum victoria cessit; Pro qua etiam parte sententiam iustiorum concludit Hotomannus, cui assentit Grotius, quod consentaneum sit cum aliarum omnium hæreditatum, & successuum hoc jus sit, idem quoque in regnorum hæreditatibus observandum esse.

Vid. Hotoman *quæst illust.* 2. Grotium lib. 2. cap. 7. §. 27, 28.

11. *An in successione ad Regnum Nepos ex filio priore, secundo filio sit preferendus?*

Cum in Germania contentio esset exorta inter Patruos, & Nepotes, de legitimo hæreditatum jure Otto Imperator primus, ejus disceptandæ causâ, Comitia Germanica indixit, & cum in Comitibus inter Principes, & Civium Legatos, conveniri non posset, Duello res commissa est, in quo Pars pro Nepotibus vicit, Exempla vero in utramque partem afferuntur. Pro filiis secundis, quod narrat Procopius, Gizerico Vandalorum rege mortuo, post habito Gundabundo, ex Gensone priore filio Nepote, Honorato secundo filio regnum delatum esse. Et Aimonius scribit, quod cum Clotarius Rex Francorum decessisset, Gunetranus secundus filius, Childeberto Sigiberti fratris senioris filio prælatus sit; Pro Nepotibus, quod Plutarchus scribit, Lycurgum, postquam regnasset circiter octo menses, cum Polydectis senioris fratris vidua filium peperisset, regnum Lacedæmoniorum ei celsisse; & Pausanias refert Cleomene mortuo, Senatuum Spartanum Areo nepoti contra Cleonymum Patrum regnum adjudicasse. Videtur, quod regulariter Nepos ex primo genito filio, secundo genito in successione præferendus sit, nisi vigore Legis sufficiens sit defuncto genere proximus, & natus maximus, quo in casu, filius secundo genitus, Nepoti ex priore filio natus minori præferendus est.

Vid. Hotoman *quæst illust.* 7. Johannem de Terra rubea. Grotium, lib. 2 cap. 7. Sect. 3. Traité de succession de régna.

12. *Utrum Nepotem ex sorore defuncti, Patruelis à successione ad regnum excludere debeat?*

Philippus Pulcher Rex Galliarum, tres habuit filios, Ludovicum, Philippum & Carolum, & filiam Isabellam nuptam Edvardo secundo Regi Angliarum, ex qua natus est Edvardus tertius, Angliarum Rex. Mortuo Philippo Pulchro, successit Ludovicus; Ludovico, Philippus; Philippo, Carolus; post mortem Caroli, Pares sive Proceres Galliarum Philippum Valesium, Caroli defuncti patruelem, (quippe Caroli Valesii, qui frater erat Philippi Pulchri filium) ad successionem in regno admittebant, posthabita Isabella, ejusque filio Edvardo, unde acerbissima bella inter Reges Angliarum & Galliarum sequuta sunt. Pro Philippo Valesio contra Edvardum Regem Angliarum prætendebatur, quod lege Salica, & consuetudine in Gallia antiquitus recepta, Faminæ, à successione in regno Galliarum, arcerentur. Ita scilicet Childerico tertio, rege mortuo, duabus filiabus exclusis, regnum Clotario delatum, & Chereberto quinto defuncto, tribus filiabus præteritis, Sigibertum fratrem successisse. Et cum Faminæ ipsæ capaces non sint, non posse jus ad filios transmitti. Secundo Edvardum Philippo Valesio, tanquam Regi Galliarum Homagium fecisse, & se Ligium illi futurum, interposita idē, pollicitum fuisse, unde ipsum Regem agnovit, & juri suo, si quod habuit, in regno Galliarum renuntiavit. E contra quod Edvardus non sine causa jus suum armis prosequutus est, asertum est. Quod cum coram Paribus quæstio haberetur, ipsius Procuratores admissi non sint, sed minis coacti sunt recedere. Quod decantata illa Lex Salica, apud omnes Historicos, & Jureconsultos, præcipuum pro Valesio fundamentum (uti agnoscit Hotomannus) commentum fabulosum & absurdum fuerit, cum Lex illa quæ præcipit, quod de terra Salica nulla portio hæreditatis in mulierem transeat, non ad Francos sed ad Salios spectet, & ut idem fatetur tantum absit, quod ad regias hæreditates pertineat, ut ne quidem ad feudales successiones, sed ad alodia tantum, quæ privati sunt patrimonii referri possit. Deinde ad consuetudinem quod spectat, non præsumendam juri communi contrariam. Per Hispaniam, Lusitaniam, Navarram, Siciliam, Neapolim, Angliam, Scotiam, à Prin-

cipatu faminas non excludi. In aliis ferè omnibus Dignitatibus Gallia, utpote in Ducatu Normannia, Britannia, Aquitania, Burgundia mulieres succedere. Exemplum Clotarii, & Sigeberti, qui posthabitis filiabus succedebant, non sufficere ad fundandam consuetudinem, iis fortassis temporibus, quibus regnum non tam hereditarium, quam suffragiis deferendum habebatur. Denique Homagium, ab Edvardo, Valesio præstitum, ei non obfuisse, quod in minori ætate Edvardi factum esset, & metu ne Valesius Ducatum Aquitanie invaderet.

Vid. *Froissardum & Walsinghamum Histor. de temper. Ed. 3. Crassan in consuet. Burgundi. Dei filius Sect. 5. nu. 38. Hptomannum in Franco Gallia cap. 10. & de successione in regno Gallia, cap. 2. Argumenta pro utraque parte in Archivis Bibliothecæ Bodlicianæ.*

13. *An Nepos ex sorore, Patruī filio in successione ad regnum sit preferendus?*

Martinus Rex Aragonia, & Sicilia filium habuit unicum Martinum, qui obiit ante Patrem, relicto filio Frederico illegitimo, sororem habuit germanam Helionoram, & ex ea Nepotem Ferdinandum Castellæ, & consanguineum Jacobum Urgellensem, Johannis scilicet Patruī filium. Martino defuncto, de regno contendebant, Fredericus illegitimus, Jacobus Urgellensis, & Ferdinandus Castellæ. Placuit Arbitrorum iudicio rem submittere. Arbitri assumpti sunt, tres ex Aragonia, tres ex Valentia, & tres ex Catalonia. Theologi, Jurisconsulti, alique omnes summæ prudentiæ, & probitatis viri. Fredericus ex filio defuncti Nepos illegitimus contendebat, se non omnino illegitimum esse, qui ex patre calibe, & matre innupta natus esset, se natalibus à Pontifice Romano restitutum, præterea meruisse, ut ipsius ratio haberetur, quod nuper amplissima victoria regnum Sicilia Aragoniæ adjecerat, Jacobus Comes Urgellensis, se masculum ex masculo descendere, faminas regni incapaces, non plus juris liberis quam ipsæ habent transferre posse, Ferdinandus Castellæ se natum ex matre, quæ Martinum Regem defunctum fratrem ex utroque parente habuit, qui cum sanguine proximus sit, naturali jure, & legibus succedere debeat

debeat. Non cautum esse legibus Aragoniæ, ne fœminæ succedant, sed id receptum, quando Mares cum fœminis sint eodem gradu conjuncti, & æquè proximi. Arbitri, qui sacris rite peractis, Advocatos per triginta dies audierant, in arce conclusi, unde, inde abire non liceret, nisi Rege declarato, tandem progressi in publicum, cum summa totius populi attentione, atque expectatione Ferdinandum Castellæ, Aragoniæ Regem pronuntiarunt.

Vid. *Laurentium Vallam* lib. 2. *Histor Ferdinand Regis*. *Marianum de rebus Hispan* lib. 19. & cap. ult. & lib. 20. cap. 2.

14. *Utrum stirpe recta deficiente, stirpis proxima Princeps, an gradu proximior in regno succedere debeat?*

Henrico tertio Galliarum Rege interfecto, Valesia familia propagata mascula defecit, & in confesso erat, jus successionis in regno, ad stirpem Borboniam pertinere, cujus Princeps & caput erat Henricus Navarrae Rex, Regis Antonii defuncti filius, cui Antonio etiam frater superfuit, Carolus Cardinalis Borbonius. Itaque cum Proceres quamplures Henricum Navarrae Regem pro legitimo Regni successore admisissent, Sacrae Ligae, sive unionis foederati, Cardinalem Borbonium tanquam proximorem, sub nomine Caroli decimi Regem declaraverunt, pro cujus jure, & titulo patronum nati sunt Zampinum quendam. Qui Cardinalem Borbonium post mortem Francisci Ducis Andegavensis, qui frater erat Henrici tertii, Antonio Rege Navarrae praemortuo, in praerogativa primi Principis sanguinis succedere debere, edito libello asseruit. Quod Antonius tempore vitae Ducis Andegavensis moriens, praerogativam primi principis sanguinis, adsequutus non sit, & proinde jus ad ejusmodi praerogativam ad Henricum filium transmittere non potuerit, quod in hereditaria successione, Suorum, Agnatorum, & Cognatorum, etiam in Feudali & Regia, haeres censendus sit gradu proximus personae defunctae, cui succedendum est. Ideoque Cardinalem Duci Andegavensi, propinquiorem, Henrico defuncto, Regi Navarrae gradu remotiori praerferendum esse. Pro Henrico Rege Navarrae, Hotomannus & alii disseruerunt, Zampinum Italum, non intellexisse differentiam inter Haerem praesumptum, sive Ap-

parentem regni, & primum Principem sanguinis. Hæredem regni apparentem, in eadem stirpe censerī filium, vel fratrem Regis, qualis fuit Franciscus Dux Andegavensis, Primum principem sanguinis esse, qui in stirpe vel linea proxima primus est, qualis fuit Antonius Henrici pater, cui sub eo nomine regni Administratio, in celeberrimo Ordinum regni conventu commissa fuerat. Neque in Hæredis, neque in primi Principis sanguinis, successione, gradum aut ætatem in alia linea, ullam prærogativam tribuere. Neminem dubitare quin in prima stirpe, quæ Valesiorum fuit, huiusmodi ratio habenda fuerit, ut filius primogeniti patrum excluderet. Quidni idem jus inter agnatos proximæ stirpis, quæ succedit loco primæ, obtineret. cum Agnati Regis causam, titulum, & jus successionis accipiant, non à Rege novissimo, sed à communi gentis authore, & Principe, quem Græci Genarchum, Latini Progenitorem appellant, idque Lege uti perhibetur, comprobatur. Qua sanctum est. Rege mortuo ad filium ejus primogenitum, vel eo præmortuo ad Nepotem ex eo Regni successio perveniat, si sine Liberis decesserit, & illius stirpis hæres masculus esse defuerit, tum ad proximæ regis gentis stirpem eodem primogenituræ ordine servato, regni successio transferatur.

Vid. Thuanum lib. 97. 1589. Camden. Eliz. eodem anno Zampinum de successione Prærogativæ primi Principis Franciæ Responsuram ad Zampinum authore P. E. A. Francofurti ann. 1589. Hotomannum de iure Success. Regiæ, Lege quartâ. Choppinura de Dominio lib. 2. cap. 12.

14. Utrum Johanne Willielmo Duce Cliviz, & Juliaci defuncto Ducis Saxoniz, Marchionis Brandeburgensis, vel Ducis Neoburgensis jus succedendi potius fuerit?

Iohanne Willielmo Duce Cliviz, & Juliaci sine liberis defuncto, jus ad succedendum in utroque Ducatu prætendebant Dux Saxoniz, Marchio Brandeburgensis, & Dux Neoburgensis. Dux Saxoniz, eo quod ante centum annos Matrimonio inter Johannem Cliviz Ducem, & Mariam filiam unicam Gulielmi Ducis Juliaci celebrato, Ducatus Cliviz, & Juliaci ab Imperatore, cum consensu Ordinum utriusque Ducatus. uniti sunt, quodque ex eo matrimonio, Willielmo Duce Cliviz, & Sybilla cum aliis filiabus susceptis, Sybilla Johanni Frederico Duci Saxoniz nupta est, ea conditione, ut

ut si Johannes & Maria sine liberis masculis morerentur, tota hæreditas ad Sybillam, & Johannem Fredericum maritum ejus, eorumque hæredes descenderet. Unde cum Johannes Willielmus (ad quem à Gulielmo Sybillæ fratre successio devenerat) sine liberis decessisset, nec pater ejus alios liberos præterquam filias reliquisset, proinde jus succedendi ad se, ex matrimonio Johannis Frederici, & Sybillæ hæredem oriundum devolutum esse contendebat. Dux Brandenburgensis eo jure nitebatur, quod Gulielmus Dux Cliviæ & Juliaci pater Johannis Willielmi defuncti, quatuor filias habuit, scilicet Mariam, Annam, Margaretam, & Sybillam, & cum Ordinibus decrevit, ut si sine liberis masculis decederet, Maria, quam Alberto Brandenburgensi Duci desponsaverat, ejusque hæredes in Ducatibus succederent, ipse vero filiam seniore, & Mariæ & Alberti, quæ in hoc casu hæres erat manifesta, matrimonio sibi conjunctam habuit. Dux Neoburgensis assererat, quod Ludovicus pater ejus, Annam secundam filiam Gulielmi Ducis uxorem duxit. Et Carolus quintus Imperator privilegium concessit, ut si Gulielmus, ejusque hæredes sine liberis masculis decederent, Principatus ejus filiabus, iisque defunctis earum hæredibus masculis deveniret, & proinde cum Maria filia prima, ante Johannem Gulielmum Ducem decessisset, nec hæredem masculum post se reliquisset, jus succedendi ad Annam matrem suam, & ab Anna ad ipsum ejus hæredem masculum transmissum esse. Princeps Deuxpontii qui Margaretam Gulielmi tertiam, & Marchio Burgraviam qui Sybillam quartam filiam uxorem duxerat, his tribus potentioribus pro integra hæreditate contendentibus, donec appareret, quid inter eos decerneretur, sibi acquiescendum statuerunt. Imperator Matthias quod Ducatus erant feuda Imperii, Edictum emisit, quo Competitores quoscunque ad judicium suum vocat. Principes vero Brandenburgensis, & Neoburgensis Imperatoris erga Ducem Saxoniam propensionem metuentes, inter se conveniunt, ut ab Ordinibus Cliviæ, & Juliaci, Lis inter eos disceptetur, & interim regimen, & Procuratorem rerum omnium Ordinibus committunt. Imperator id indignatus, Leopoldum Archiducem Austriæ clam Juliacum mittit, qui urbem ingressus, pro locum tenenti generali Imperatoris se gerit, munitione in urbe parat, & copias militares aliunde accersit. Princeps Anhaltinus, cum copiis è Gallia, & ab unitis Belgicæ provinciis

ad auxilium Principum Brandenburgensis, & Neoburgensis veniens Leopoldum in Germaniam, se subducere, & Prædidiarios urbe cedere coegit Imperatoris & Ducis Saxonie partibus favebant Rex Hispanie, Archidux Albertus, Principes domus Austriacæ, Prælati Electores & aliquis Principes Reformatæ Religionis in Germania. Causam Brædeburgensis, & Neoburgensis sustinebāt, Rex Gallie, Anglie ordines Belgie, Princeps Palatinus Rheni, & alii in Germania Principes reformatæ religionis, Cum omnia ad bellum spectarent, Electoribus Imperii aliisque intercedentibus concordatum est, ut Dux Saxonie, cum Marchione Brandenburgensi, & Duce Neoburgensi ad ius possessionis in ditionibus controversis admitteretur, quod specie magis quam revera obtinuit. Postea ex occultis æmulationibus, & suspicionibus, inter Brandenburgensem, & Neoburgensem, dissensiones coortæ sunt, & Neoburgensem ut affinem potētem ascisceret, Ducis Bavarie filiam uxorem duxisse & ut Imperatoris, & Pontificiorum Germanie Principum gratiam conciliaret Religionem Romanam amplexum fuisse credebatur. Unde Dissidiis in bellum erumpentibus Brandenburgensis ab unitis Ordinibus Belgie, & Neoburgensis ab Alberto Archiduce copias auxiliares petit. Hæc eo tempore contingebant, quo Rex Hispanie & Albertus inducias duodecem annorum cum Ordinibus pepigerunt, utrinque verò Exercitus retinebantur. Itaque Marchio Spinola cum militibus Regis Hispanie, ex altera parte, Mauritius Princeps Auriaci cum copiis unitarum provinciarum ex altera, Ducatus invadentes, oppida, & loca præcipua occupant, quibus pro iuribus Principum Brandenburgensis, & Neoburgensis potiti sunt, suis vero rationibus opportuna nacti haud cito dimissuri videbantur, unde Cardinalis Bentivolius censuit. Principibus minus potentibus cavendum esse, quo consilio potentiorum auxilia in ditiones suas invocent.

Vid. Historiam Belgi Angl. lib. 17. Cardinale Bentivoglio Relation del massa d' arme par le coja de Cleves Juliers Discursum super success. Iuliacensi & Antidiscursum per Anonymos Etia cof. 1625.

SECT. IV

De Quæstionibus Debiti inter eos quibuscum Pax est.

Quæstiones de Debito inter eos quibuscum Pax est sunt veluti de Privilegiis Congressus & Legationis Civilis, Ite inde Conventione, & Fœdere civili, de fide & juramento qua iis adhibentur.

Utrum Principes de loco & præcedentia contendere debeat.

Lactantius nihil fœdus, nihil arrogantius esse ait, & nihil à sapientiæ ratione remotius, quam de Dignitate contendere, & plerique redarguunt, quod in arduarum rerum tractatione, sæpius de sessione acrius, quam de rebus ipsis contenditur. Sed & aliquando ineptum, & vanum apparet, utpote, refert Warsevicus, cum duorum Principum Italiæ Legati Pragæ super pontem occurrissent, & neuter alteri locum cederet, ferè toto die constiterunt, & se omnium risui exposuerunt. E contra asseritur Deum esse authorem Ordinis, nec pugnare cum humilitate, gradus seu ordinis distinctionem tueri, & Jurisconsulti tradunt, quod Ordinis & Sessionis prærogativam, armata manu defendere liceat. Salutis vero, & utilitatis publicæ ratio præcipuè habenda est. Ita cum in prælio contra Persas, contentio incidisset inter Arcades & Athenienses, utra gens priore loco pugnaret, ad Platæas; laudantur Athenienses, quod in illo communi periculo patriæ, maluerint cedere, cum dicerent, ubicunque collocati fuerimus, viros fortes nos præstabimus.

Vid. Besoldum de Præcedentia, c. 3 nu. 7, & 8. Nolden de Nobilitate, cap. 15, nu. 1. & 55.

Utrum

Utrum Locus potior pro numero an pro præstantiâ dignitatum debeatur?

DE Sessiois & Præcedentiæ prærogativa inter Galliæ & Hispaniæ Reges sæpius concertatum est. Anno 1556. Hispanus, cum in aula Pontificis obtinere non potuit, apud Maximilianum secundum, consanguineum effecit, ut Caroli noni Legatis, in aula Cæsarea Principis Loci prærogativa denegaretur, quod pro tam insigni injuria habitum est, ut Casparus Colinius Admirallus, causam sufficientem esse, ad bellum Hispano movendum Regi Galliæ obnixè persuaderet, uti refert Thuanus. Pro Hispano arguitur, quod Illius imperium, longius latiusque quam omnium reliquorum Principum totius Europæ porrigatur. Pro Gallo quod regnum Galliæ, ejus partibus arctè, & circulariter continuatis, linguaque & moribus unitis, Hispano imperio potentiâ nequaquam cedat, Multitudinē titulorum Majestatem non augere; unde cum Carolus quintus Imperator, Literis ad Franciscum primum Galliæ Regem missis, pro Titulis numerosam Provinciarum, & Dominiorum recitationem adhibuisset, Rex Galliæ in responso, rescripsit. Franciscus Dei gratia Galliæ Rex, & Dominus Gonesæ, quæ pagus est totius regni prope minimus, innuens, se unicum Regnum Galliæ omnibus Imperii Provinciis æquale æstimasse.

Vid. *Besold de Præcedent* c. 6 nu 6. *Bodinum*, lib 1. cap. 9 nu 145 *Molinaum de Monarchia Franc.* *Nolden de Nobilitate*, c. 9. nu 74. & 179. *Vasquium in præfatione illustrium Controversiarum.*

An Locus potior ei qui ampliorem, an ei qui antiquiorem dignitatem obtinet sit concedendus?

IN Conventu Bononiæ, Anno 1600. inter Legatos Reginæ Angliæ, & Regis Hispaniæ oborta est quæstio de potiori loco in sedendo, & incedendo. Pro Hispano pretendebatur, ut solet, longè latèq; diffusa amplitudo, cui responsum ob pluralitatem dignitatum, aliquem non esse præferendum, si nulla per se sit sufficiens ad præcedendum, Castellæ regnum, cujus titulum Hispanus cæteris

ris anteponit, præ Angliæ regno esse nuperum, Comites enim, non Reges habuisse ante annum salutis 1017. Tertiò in libro Ceremoniarum Curie Romanæ, quæ, ut habent Canones, veluti Domina, Mater, & Magistra dat normam aliis, inter Reges primum locum statui Regi Gallie, secundum Regi Angliæ, tertium Regi Castellæ. Quartò in Conciliis Constantiensi, Senensi, Basiliensi Regem Angliæ secundum locum tenuisse. Quinto, Julium secundum Pontificem Romanum pro Henrico septimo Rege Angliæ, contra Ferdinandum Castellæ pronuntiasse.

Vid. Camdenum anno 1600 Robert. Wingfield de Prælatione regni Britan. in Concilio constant. Piern Matthieu Hist. lib. 7. narrat. l. §. 12. Meteranum Hist. Belg. lib. 13.

Utrum Legato Principis superioris absentis, Princeps inferior præsens præferendus sit?

Generaliter moribus receptum est, ut omnino idem Honor exhibeatur Legatis, qui iis à quibus missi sunt, si præsentessent, deferretur. Idque constanter affirmat Paschalius. Quod Legati sunt Principum eorum qui miserunt, alteræ, sive geminæ personæ, Excipit duntaxat Principem, ad quem missa est Legatio quem in ditione sua eminentiori loco esse æquum est. Refert tamen Conradus Brunus in Germania Electores præsentessentium Legatis præferri idque se inter Principes animadvertisse testatur, Pro quo facit textus in Aurea bulla tit. 25. Cui etiam congruit quod narrat Colerus in Comitibus Norimburgensibus anno 1542. Quod Caroli quinti Legati, Ferdinando germano postponebantur, Et Sleidanus quod Dux Cliviensis præsens, noluerit Electoris Saxonie absentis Legatis cedere. Ratio habetur, Quod in Principe præsentis est revera Majestas, in Legato tantum Dignitas aliena & ficta. Vel forte mos in Germania ex Constitutione Aureæ bullæ, à moribus aliarum gentium diversus invaluit.

Vid. Paschal. de Legat. cap. 38, Brunus de Legat. Besoldum cap. 5. nu. 6.

Utrum superiori Electo, nondum confirmato, Rex inferior cedere debeat?

Cum Caroli quinti, Regis Romanorum Electi, & Galliarum regis Legati anno 1521. Caleti convenissent. Antonius de Prato Jurisconsultus celebris, & Galliarum Cancellarius, Mercurino Caroli quinti Cancellario ideo præcedentiæ quæstionem movit, quod Carolus unctionem à Pontifice nondum accepisset. affirmans igitur eum Gallo, ut Regi uncto, cedere oportere. Contrà asserebatur, Imperatorē ab Electoribus renuntiatum, omnia posse, quæ potest post coronationem Pontificiam, & pro potestate Dignitatem ei deberi.

V. d. Besold. de Præceden. cap. 2. nu. 4. Arumæum de Iure pub. dissert. 1 a. finem.

An in Colloquiis & Literis Serenissimi titulus iis adhibendus sit, qui Reges non sunt?

Cum in Tractatu Bononiæ, in Mandatis Reginæ Angliæ, Archiduci Alberto Illustrissimi, non Serenissimi titulus deferretur, Legati Regis Hispaniæ tractatum pertinaciter averfati sunt, nisi in Autographo Reginæ, ubicunque Archiducis mentio fieret, Serenissimi titulus apponeretur. Asseritur Serenissimi titulum Imperatori, & Regibus solis, qui Majestatem habent, convenire. Quod Duces sint tantum spectabiles, saltem Illustrēs. Contrà, Quod Ducibus Majestas competat, id est status major, vel major potestas; Item quod in eos crimen Majestatis admittatur, quod multi Duces superiorem non agnoscant.

Vid. Camden, anno 1600. Ludovic. Rudolphinum de Dignitate Ducum Italia.

An qui imperium summum non habent, Legatos mittere possunt?

Elizabetha Angliæ Regina Christophorum Assonvilium, à Duce Albano Legatum ad se missum, quod nullas à Rege Hispaniæ literas attulisset, non admisit; & cum Nobiles Genuenses Stephanum Marium, & Bartholomæum Comellinum ad Philippum Hispaniæ regem misissent, Talicarnanes contrariæ factionis in re-
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pub. Genuensi, intercessit, dicens Homines privatos Oratores mittere non posse. Constat tamen Appium Claudium Prætorem, ad Hieronymum filium Hieronis, Scipionem ad Syphacem, Lucullum ad Tigranem, Casarem ad Ariovestum Legatos misisse. Paschalius ad magnitudinem Romani imperii refert, quod qui magnis provinciis præficebantur, se Regibus æquales ferebant: deinde, quod huiusmodi legationes, de communibus negotiis, inter provincias conterminas necessariæ, cum aliquando summæ potestatis consulendi non est otium, admittuntur, nec tamen inter justas Legationes censendas putat. Eodem modo Principibus Germaniæ & Liberris Civitatibus, de rebus ad ipsos, pertinentibus jus, Legatos mittendi afferunt.

Vid. *Besoldum de Legatis cap. 3. Paschalius cap. 14.*

Utrum Religiosi & Clerici ad Legationes civiles obeundas sint adhibendi?

Boccalinus in Satyra Pernaſſea refert Zenonem quendam, Sectæ & gravitatis Stoicæ, Apollinem accessisse, honoris & salutandi causa, priusquam, uti fatus est, in longinquam peregrinationem ad obeundam de magnis rebus Legationem à Gnidi Principe designatus proficisceretur; quod ut Apollo audit, Gnidi Principem, tunc præsentem reprehendit, quod more quorundam, ut sumptibus parceret, hominem nullius splendoris in Legationem mitteret: Zenonem vero non sine indignatione objurgavit, quod ipse aliique ejusdem Ordinis, contra professionem qua aulica negotia maxime se averſari videri cupiunt, Legationes ambirent, in quibus ad gratiam Principum multa contra honestatem facere non verebantur, ut Taciti censuram meriti juste videantur, qui eam sectam turbidos & negotiorum appetentes facere dixit. Sub Stoicorum Religiosos & clericos intellexisse non dubitatur, cui suffragatur quod tradit Cominæus. In Hispania jam olim usitatū fuisse, omnia per Religiosos seu Monachos cum exteris agere, vel quod optimè simulare sciant, vel ut sumptuum compendium fiat. Et non solum Canones Ecclesiastici Ne Monachi vel Clerici temporalibus negotiis se immisceant severe præcipiunt, sed & Apostolus monet, ut

Nemo Deo militans negotiis sæcularibus se implicet. Campanella vero Politicus ingeniosus personas Ecclesiasticas omnibus negotiis adhibendas suadet, quod magis prudentes, cautiq; sunt, & ob cœlibatum affectibus privatis minus indulgent. Et Petrus Matthæus summis laudibus effert Religiosos & Monachos ob officia magnis principibus animis & armis inter se dissidentibus fælici cum successu præstita, & memòrat quod Sanctus Bernardus Moguntiam ivit, ut Lotharium Cæsarem cum Conrado Imperatore conciliaret, & Conradus Sineta Augustinianus pacem inter Venetos & Francos tractavit. Pontifex Romanus inter Henricum quartum Galliar, & Philippum secundum Hispaniar regem, medium se interponens, ministerio Bonaventuræ, Calatagirones Franciscanorum Generalis, qui ad utrumq; regem sanctas & salutare exhortationes pacis referret usus est. Sed & Pater Johannes Ney, Belgicas inducias procuravit, & Hiacyntus Capucinus in maximis orbis Christiani negotiis non ita pridem Legati munus obiit.

Vid. *Boccali Regal. centuria* 1. 3. *Conr. Brunum*, lib. 8. cap. 3 *Comineum* l. 8. c. 16. *Pierce Martheum Histoire de la pair. Berold. cap. 4 nu. 4.*

An faminis legationes mandari possint?

Cum Sabini Romanis, quod virgines quæ ad spectandum ludos Equestres venissent, vi rapuerant, bellum ferociter inferrent, à Senatu decretum, ut quotquot è mulieribus Sabinis liberi essent, hæ relictis liberis, ad populares legatione fungerentur, quam cum suscepissent Pax est facta, sequutaq; res mira, inquit Florus, ut relictis sedibus suis in novam urbem Hostes demigrarent, & cum generis suis avitas opes pro dote sociarent. Kirchnerus vero negat mulieres Sabinas legatione functas, quia Leges Romanæ prohibent mulieres officiis virilibus fungi. Et Edictum Prætoris expresse vetat fæminas pro aliis postulare, quod erat contra verecundiam sexui congruentem, cui Edicto causam dedit Caia Afrania, Licinii Buccionis senatoris Uxor, quæ non quod Advocatis destituta erat, sed quod impudentia abundabar, inusitatis foro latratibus, assidue tribunalia exercebat, adeo ut improbis fæminarum moribus Afraniæ nomen pro crimine objiceretur. Et Martianus Jureconsultus tradit

dit eos qui postulandi jus non habent Legatione fungi non posse. Paschalius vero contra Kirchneri sententiam acriter contendit, & faminas honestas causas cum laude egisse ostendit, utpote cum Ordo matronarum gravi tributo à Triumviris esset oneratus, nec quisquam virorum patrociniū iis accommodare auderet, Hortensia L. Hortensii filia, causam faminarum apud triumviros & constanter, & feliciter egit. Repræsentata enim patris facundia impetravit, ut major pars imperatæ pecuniæ iis remitteretur. Sed & quandoq. famina Legationibus obeundis maximè idoneæ habitæ sunt: Cum Romæ in Senatu deliberatum esset, an Veturia & Volumnia cum alijs matronis ad Coriolanum & Volscos à quibus urbi periculum impendebat cum Legatione mitterentur, & de ea re usq. ad vesperam multa verba facta essent; non dubitabatur, inquit Dionysius Halicarnassensis, an hoc officium faminis conveniret, sed alij verebantur; ne si hostes, neglecto jure gentium, tot matronas cum liberis retinerent urbe absq. belli periculo potirentur, vicit tamen eorum sententia qua matri & uxori alijsq. matronis urbe exire & Legationem obire concessum est; cumq. Valeria Veturia matri Coriolani ut Legationem susciperet suaderet; si, inquit, filium in urbem reduxeris, ipsa immortalem gloriam consequere, ob ereptam tanto periculo patriam, & nobis apud viros major erit honos, bello à nobis summoto, quod ipsi repellere nequiverunt, ac censebimur progenies illarum quæ sub Romulo bellum Sabinum Legatione sua submoverunt, Conciliatisq. Ducibus ac populis urbem hanc ex parva magnam fecerunt.

Vid. Ercdrum tit. de Legationibus, cap. 21. Valerium Max. lib. 8. c. 3. Paschalius, cap. 20.

An Legatio ex causa privata decernenda sit?

Phrynon Atheniensis cum rediret à certamine Olympico captus est à quibusdam Philippi Comitibus, & omni pecunia spoliatus, Athenas reversus Athenienses rogat, ut sibi Legationem ad Philippum decernant, ea intentione ut ea quæ amiserat recuperaret, quod populus ipsi concessisse dicitur. Lege duodecim tabularum hujusmodi Legatio prohibita fuit hisce verbis Rei suæ ergo, nequis

Legatus esto, & Cicero in tales Legatos acerbè invehitur, asserens, nihil esse turpius quàm quenquam Legari nisi reipub. causa. Cùm Romæ concessa est libera dicebatur, quod nullo tempore vel loco circumscripta, nec rationibus reddendis obnoxia esset. Scipioni Nasciæ huiusmodi Legationem decretam Plutarchus commemorat quo tutius honorificentiusq; in Asia esset quo proficiscebatur, plebis ob necem Gracchi infensæ furorem, si Romæ substitisset, reformidans. Quinetiam Cicero quo magis à curis quibusque vacuus commentationibus operam dare posset, huiusmodi Legationem, sive cessationem liberam & otiosam sibi exoptavit, & Mamutius docet Senatoribus aliquando necessario aliquam huiusmodi remissionem impetrandam fuisse, quoniam aliter Roma abesse non concedebatur.

Vid. *Gentilem de Legation. lib. 1. cap. 8. Paschalium, cap. 13. Besoldum. de Legat. cap. 2. nu. 3.*

An Legatis permittendum uxores secum ducere?

ZEmosthenes Charmoleus Massiliensis, cum Legationes pro patria obiret, Lydimacham uxorem, licet mala forma fæminam, secum circumduxit: & Isdigunnas ab Chosroe Persarum Rege ad Justinianum Legatus, in eam Legationem & uxorem, & filiam assumpsit. Aliis tamen, & incommodum, & periculosum videtur, Legatis uxorum consortium: & iisdem argumentis nituntur quibus usus est Severus Cincinna cum in Senatu censuit, ne quem Magistratum, cui provincia obvenisset, uxor comitaretur. Haud, scilicet, frustra placitum olim, ne fæminæ in socios, aut gentes exteras traherentur, inesse mulierum comitatu quæ pacem luxu, bellum formidine morentur, & Romanum agmen ad similitudinem barbari incessus convertant, non imbecillem tantum, & imparem laboribus sexum, sed si licentia adsit, sævum, ambitiosum, potestatis avidum. His statim adhærescere deterri- mum quemque Provincialium, ab his negotia suscipi, transigi: Alii vero cum Valerio Messalino, qui Cinnæ respondit, censent, Multa duritie veterum melius & lætius mutata, pauca fæminarum necessitatibus concedi, quæ ne conjugum quidem penates, adeo fo-

cios

cios non onerent, cætera promiscua cum marito, nec ullum in eo pacis impedimentum, & revertentibus post laborem quod honestius quàm uxorum levamentum? At quasdam in ambitionem, aut avaritiam prolapsas. Quid ipsorum Magistratuum, nonne plebrosq; variis libidinibus obnoxios? Non tamen ideo neminem in provinciam mitti, corruptos sæpe pravitatibus uxorum maritos, num ergo omnes cælibes integros, frustra nostram ignaviam alia ad vocabula transferri, nam viri in eo culpam, si fæmina modum excedat. Porro ob unius aut alterius imbecillum animum, malè eripi maritis consortia rerum secundarum adversarumque, simul sexum natura invalidum deserui, & exponi suo luxui, cupidinibus alienis, vix præfenti custodia manere illæsa conjugia, quid fore si per plures annos in modum dissidii oblitterentur. Sic obviam irent iis quæ alibi peccarentur, ut flagitiorum urbis meminissent, &c. Et Legatis, ita ut Magistratibus uxores suo periculo secum ducere prudentes statuunt, de quo Ulpianus Proconsulem ait melius esse in Provinciam proficisci sine uxore, sed & cum uxore posse, dummodo sciat Senatum Cotta & Melsalla, Consulibus censuisse futurum, ut siquid uxores eorum qui ad officia proficiscuntur, deliquerint, ab ipsis ratio & vindicta exigatur.

Vid. Tacitum *Annalium*, lib. 3. *Paschalius* cap. 33. *Resolutum de Legat. c. 4. nu. 11. D. de Officio Proconsulis l.*

An per partem Legatorum Legatio peragi possit?

Sergius à Justiniano ad Chosroem Legatus, cum Constantianus alter Legatus aggritudine detineretur, in Persiam penetrare noluit; cum vero Callicratem Rhodiorum legatum, morbus abstulisset, Dixit, alter Legatus Romam perrexerit. Et è multis Legatis Indicis ad Augustum, uti refert Strabo, tres tantum Romam pervenerunt, & Legationem peregerunt, cum alios viæ longitudo, & alia incommoda absumpissent. Paschalius tradit luce clarius esse, Legatos non impeditos aliorum vice fungi posse, ita etiam de Legatis Provincialibus in jure cautum, ut possit quis necessitate cogente, & per alium Legationem mittere. Sic legati Romani qui ad Jugurtham Adherbalem obsidentem missi erant, simul atque Uticam

Uticam appulsi essent, nuntium cum literis ad eum mittunt, quibus significant, se ad eum à Senatu missos, & ut quam ocyssimè ad provinciam accedat, jubent.

Vid. *Paschaliū cap. 31.*

An Legatum aliquando non admittere liceat?

Denuntiatum Ætolis à Romanis est habitos eos iri pro hostibus si Legati venirent, & Legatis Persei dictum non venturos tuto, Coriolanus interminatus est pro Exploratoribus se ducturum eos qui adfuerint. Licitum quidem Gentilis affirmat Principi vel populo prohibere, ne Legationes ad se veniant, quia aliter homo alienus in alieno solo invito Domino sisteretur, videre tamen oportet ut aliqua ex causa fiat hæc prohibitio, Grotius ait Non omnes Legatos admitti præcipit jus gentium, sed vetat sine causa rejici. Et causa non admittendi iusta habetur. 1º Si Legatus missus sit ab indigno, unde Totila semper perfidi Legationem rejecit Justinianus & Cynethensium ut gentis sceleratæ Legatos undique pulsos narrat Polybius. 2º Si indignus sit qui mittitur, unde Lysimachus Theodorum qui 23. vocabatur, à Ptolomæo missum, audire noluit, 3º Cum mittendi causa sit suspecta unde Romani Perseo denuntiaverunt, ne Romam mitteret, sed ad Licinium.

Vid. *Gentilem lib. 2. cap. 5. Grotium lib. 2. cap. 18. § 3. Paschaliū cap. 36. & 41. Besoldum de Legat. cap. 4.*

An Legatus pro utilitate publica præter mandatum aliquid agere possit?

Athenienses Legatos suos missos in Arcadiam, quamquam re bene gesta domum reverbos capite puniverunt, eo quod alio quam ipsis mandatum fuerat itinere iverant: & cum Attilius Consul ab Senatu missus in Græciam ut Athenienses & Ætolos contra Philippum tueretur, præter quod Senatus mandaverat Hæstizam, & Anticyram expugnavit, & evertit, ea re Romam nuntiata, Senatus censuit, ut quamprimum Attilio. Flaminius successor mitteretur. Quandoque tamen expedit reipub. Legatum esse ver-

satili

satili ingenio, ad eundem finem modos alios quam præscripti sunt adhibere. Ita cum Civitas Lampfacenorum, ad placandum Alexandrum omnia dira minitantem, Anaximenem, Philippo patri ipsiq; probè notum misisset, & Rex cognito cui rei venisset, Græcorum Deos testes invocasset, se omnia facturum contraria iis quæ is postulare. Anaximenes id compertum habens, cum in Regis conspectum venit, Per Deos amicitiamque, Rex, inquit, Ego te rogo, ut Coniuges & liberos Lampfacenorum in servitutem redigas, urbem excindas, & ne templis quidem Deorum immortalium abstineas: Ejusque tantum valuerunt preces, ut Alexander civitati ignoverit. Valerius Maximus memorat Legatos qui à Senatu Tarentum, ad res repetendas, missi erant, cum injurias ibi perquam graves acceperant, unus etiam urinâ respersus esset, in theatrum introductos, Legationem verbis quibus acceperant peregrisse, de iis quæ passi erant questos non esse, ne quid ultra mandatum loquerentur. Carthaginienfis vero Legati circa mandata tanta religio non erat; qui Romæ in Senatu manifestum fecit, sibi postquam eo venerat decies togam furto sublatam fuisse.

Vid. *paschaliū cap. 56. 57. 58 Besold cap. 7. nu. 3.*

An Princeps ex eo teneatur, quod Legatus agit præter mandatum arcanum?

Ferdinandus et Isabella Reges Hispaniæ pacem ab Archiduce Austriæ eorum genero, qui mandatum satis amplum habuit, ratum habere abnuerunt, quod contra mandata arcana pepigisset. Male, inquit Gentilis, & contra illa quæ decent Principem, cujus unus calamus, una lingua esse debet; Horum autem duo calami, duæ linguæ; & quod intolerabilius, alter calamus, altera lingua hosti ignota. Quæ ratio si recipiatur, nullum certum fœdus iniri potest. Grotius ita statuit. In generali præpositione accidere potest ut nos obliget qui præpositus est agendo contra voluntatem nostram sibi soli significatam, Quia hic distincti sunt actus volendi, unus quo nos obligamus ratum habituros quicquid ille in tali negotiorum genere fecerit; alter quo illum nobis obligamus, ut non agat nisi ex præscripto, sibi non aliis cognito. Quod notandum, inquit, est ad ea quæ Legati promittunt pro Regibus, ex vi instrumenti Procuratori excedendo arcana mandata.

Vid. *Guicciardinum lib. 6 Gentilem lib. 3. cap. 14. Grotium lib. 2. cap. 11. §. 12.*

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An Legatus admittendus sit ad procurandum causas subditorum Regis sui?

Naves aliquando onustæ mercibus & bonis quæ fuerunt subditorum Regis Hispaniæ in portus Angliæ appulerunt ; de iis cum nomine subditorum in Curia Admiralitatis lis intentata esset, Legatus Regis pro subditis intervenire voluit . Dubitabatur, an ad agendum admitti deberet, quod huc ad publica Regis negotia transigendum destinatus esset; & quod eum qui pro aliis agit mandatum eorum habere debeat : quibus responsum est, Res subditorum ad principem pertinere, cum ejus inter sit, ne damnis afficiantur, quo Locupletiores existant, & onera publica melius sustinere possint; quod absque mandato quilibet possit absentes defendere, & contra spoliatores agere, quodque Hispanorum causæ fuerint causæ spoli

Vid. Gentilem Advocat. Hispania lib. 1 cap. 18. Wesenbecium In Cod. lib 3 tit. 16 nu 24.

An Legato mendaciis uti liceat?

Henricus Wottonius pro Jacobo Rege Angliæ ad Venetos Legatus missus, in itinere per Germaniam transiens, rogatus Symbolum in tabulis viri cujusdam nobilis inscribere, ita scripsit. Legatus est vir bonus peregrè missus ad mentiendum Reipub: causa; quod Schoppius in calumniam Regis contorquens, scripsit, se tulum in famam & existimationem regis minimè contemnendum reperisse, quod ejus Orator apud Venetos, se propterea ut Regis causa mentiatur peregrè missum esse adeo non dissimulet, ut id ultro passim jactitet. Ad hoc opprobrium diluendum Wottonus ad Marcum Velsrum Augustæ Vindelicorum Duumvirum ita scripsit, Definitionem adeo fortassis Catholicam ut etiam Legatos à Latere complecti possit; se vero mirari quod Schioppius familiaritatis scrinia referet, & post octennium resuscitet obsoletum saltem, & interpretetur non solum tanquam serio, sed & jactanter scriptum, nec eo contentum, conatum fuisse, intemeratum Optimi Regis nomen per ipsius jocos in invidiam trahere, quasi Domini servorum lusus præstare

præstare tenerentur; & ad quæstionem ita Paschalius. Volo legatum niti veritate, certissima virtutum; ejusque fido comite partilcoquo. Non sum tamen ita rusticè torvus ut Officiosum mendacium omnino excludam ex ore Legati. Nempe si id agitur, ut errato ignoscatur, ut ultio remittatur, innocentia sublevetur, Odio amoto quod est in vocabulo, manebit sola gratia rei. Certe obseptis aliis juvandi periclitantem itineribus, non habeo ambiguum quin hoc ingrediendum sit quamvis obliquum. Existimo mendacium, inquit Diphilus, pro salute dictum nihil parare infortunii. Annibal cum Africa excessisset & in Corcyram insulâ trajecisset, percontantibus, Legatum se Tyrium dici jussit. Hujusmodi quoque perfugio usus est Xenophanes Princeps ejus Legationis quæ à Philippo mittebatur ad Annibalem: Quippe hi Legati petentes Capuam, media in præsidia Romana delati sunt, deductique ad M. Levinum Præto-rem circa Nuceriam castra habentem. Ibi intrepide Xenophanes à Philippo Rege se missum dixit, ad Senatum Populumque Romanum, ad jungendum amicitiam & societatem cum populo Romano. Aliquando legatio, qualis fuit Gabeonitarum ad Josuam, non in aliud quàm ad dicendum mendacium destinatur, cui ignoscitur, si non in eorum perniciem quibus dicitur, sed ad eorum salutem qui usurpetur dicunt.

Vid. Wottonii ad Velferum Epistol annexam Opuscul. Hercules tuam fidem Paschalius cap. 54. Besold. de Legat c. 4 nu. 6.

An Legatis securitas debeatur ab aliis quam ad quos missi sunt?

Philippi Macedonum Regis Legatus ad Annibalem cum literis jungendæ societatis gratia missus, comprehensus & ad Senatum Romanum perductus, incolumis dimissus est: sed, uti inquit Justinus, Ne dubius adhuc indubitatus hostis redderetur. Jus enim gentium de securitate Legatis præstanda non ad eos pertinet per quorum fines sine veniâ ad alios transeunt Sivero male tractentur, Dignitas ejus à quo missi sunt, aut ejus ad quem eunt, læditur, & Amicitia periclitatur.

Vid. Gentilém lib. 2 cap. 7. Grotium lib. 2. cap. 18. §. 5. Ærodius de Legatis cap. 18. Besoldum tit. 5. nu. 18.

An Exuli ad Principem suum Legato securitas debeat?

PERSEUS Rex Macedoniæ Illyricū exulem, ad Gentium Illyricorū Regē Legatum misit, Gentilis certissimum esse ait, si exul ad interdicta loca redierit, plecti posse, nec nomen Legationis ipsi optulari; si Illyricus nihil mali passus sit, nō ad jus, sed ad factum referendum. Et in hoc Legationum argumento remitti aliquid de summo jure solitum, Et si eū Exulem Gentius Legatum exceperit, excepto Legationis jure denegare non potuit. Juris tamen patrii consultissimus nostras EDVARDUS Cocus, ejus quod cum exteris obtinet non adeo peritus, tradit, si Exul ad locum à quo ablegatus est, Legatus missus fuerit, nec detineri nec offendi possit: ad idq; confirmandū refert; quod cum REGINALDUS Polus Proditionis damnatus Romæ agens à Papa ad Regem Galliæ Legatus missus esset, & HENRICUS octavus Rex Angliæ à Rege Galliæ postularet ut in Angliam transmitteretur, non obtinuisse. Polus vero eo tempore non ad Regem Angliæ à quo proscriptus erat, sed ad Regem Galliæ Legatus erat, cui nec subditus, nec obnoxius aliquo modo fuit. Sed postea cum PHILIPPO & MARIA Regibus à Pontifice ad conciliandum regnum Angliæ sanctissima, uti habebatur legatione fungeretur, etsi Duo regni Proceres mandato regio ipsi Bruxellas usque convenissent, regnum tamen ultra Doveriam ingredi non est ausus, priusquam in Comitibus regni lege de ejus proscriptione abrogata, omnibus nobilitatis & patriæ juribus restitutus fuisset.

*Vid. Gentilem lib 2 cap 10. Cocum de Jurisdictione Curiarum cap. 26.
Goodwinum Annal. anno 1537. & anno 1554.*

An legatus in Loco ubi Legationem obit, actione civili conveniri possit?

DE omni contractu quem tempore Legationis iniit Legatum judicium subire debere censet, Ne aut Legatis, quod inquit JULIANUS, potestas detur, res alienas domum auferendi, aut, quæ est Pauli ratio, cum iisdem nemo contrahere velit, & quodammodo iis commercio interdicatur, Quæ etsi de Provinciali Legato à Jureconsultis traduntur, explorata tamen ratio facit jus idem etiam majoribus.

joribus Legatis commune. Idem affirmat Paschalius, quod & ipsi de eo damno quod Legationis tempore passi sunt experiri possunt, Grotius contrarium statuit. Nec bona Legati mobilia pignoris causa, aut ad solutionem Debiti capi posse, nec per iudiciorum ordinem, nec manu regia. Nam omnis coactio abesse à legato debet, tam quæ res ei necessarias, quam quæ personam tangit, quo plena ei sit securitas; si quid ergo debiti contraxit, ipse compellendus erit amice, & si detrectet, is qui misit; ita ut ad postremum usurpentur ea quæ adversus debitores extra territorium positos usurpari solent.

Vid. Gensilium lib. 2 cap. 16. 17. Paschalius cap. 37. Grotium lib. 1 cap. 13. § 9. & 10.

An ex domo Legati, delicti reos, extrahere liceat?

A Bondius quidam, Cavazza, & Valerius Cives Veneti qui in magnum reipub præjudicium arcana Senatus consilia prodiderant, detecti in ædes Legati Gallici se receperunt, cumque Officialibus postulantibus nullo modo exhiberentur, navigio cum apparatu bellico ante ædes collocato, tandem traditi & supremo supplicio affecti sunt. Quod cum Rex Galliæ rescivit aliquandiu Legatum Venetum in præsentiam admittere renuit, postea in publico accedenti, de facti indignitate, ex postulans, dixit haud æquo animo laturos Venetos si contra eorum Legati domum officiales sui eadem molirentur. Cui statim Venetus Legatus, respondit, se optare si qui essent contra Regem proditores, ut in ejus hospitio deprehendi possent, eos se statim traditurum, cum pro certo haberet, si fecus faceret rempub. Venetorum nequaquam approbare velle. Paschalius qui prolixè de Legatorum Jurisdictione differit, de hac questione ita censet; Si is qui postulatur læsæ majestatis, aut atrocissimi criminis reus sit petenti magistratui Legati ædes patere debere; extra talia crimina existimat præcipua quadam prærogativa. Legati ædes frui debere. Grotius distinguit inter Legati Comites, sive familiam & alios, & statuit si quid Comites gravius deliquerint, postulari poterit à Legato ut eos dedat, vi autem abstrahendi non sunt; quod cum factum esset ab Achæis in Lacedæmonios quosdam, qui cum Legatis Romanis erant, vociferati sunt Romani jus gentium lædi; si dedere eos nolit legatus, pæna exigenda est ab

eo qui Legatum misit, & si nolit, contra ipsum tanquam fautorem criminis bellum denuntiandum. Quoad alios vero, ait, an Legatus in domo sua jus Asyli habeat, pro quibulvis eo confugientibus pendere ex concessione ejus apud quem agit? Istud juris gentium non esse.

Vid. *parulam lib. 10. Or. 11. anno 1541. Paschal cap 76. Grotium lib. 2 cap. 18. §. 8.*

An Legatus delinquens ad suum Principem remittendus sit ?

Legati Tarquinii qui seditionem Romæ concitaverant, quamquam digni visi sunt ut hostium loco essent, tamen, inquit Livius, jus gentium valuit. scilicet ne occiderentur, Philæas autem Tarentinos cum Romæ Legatione fungeretur, quod ad Obsides Tarentinos aditum sibi invenisset, eosque crebris colloquiis sollicitatos corruptis ædituis, custodia eduxisset, & Comes itineris factus, cum ipsis aufugisset, cum illis retractus, & in Comitibus deductus populo probante virgis cæsus & de saxo dejectus est. Cum hoc vero actum severius quod subditorum Legatus fuerat. Alias, uti refert Polybius, Legato qui Romæ Obsidibus fugiendi causam præbuerat, nihil aliud actum quam quod finibus jussus sit excedere. Perperis de hac re diversorum sententiis, Grotius videtur statuere, Si tale sit delictum quod contemni possit, dissimulandum esse, si crimen sit atrocius & ad publicum malum spectet, remittendum esse Legatum ad eum qui misit, cum postulato ut eum puniat, vel dedat. Quomodo Galli postularunt, ut Fabii sibi dederentur, sed ut obviam eatur imminenti periculo & retineri & interrogari potest, quod cum Tarquinii Legatis factum innuit. Quod si vim armatam intentet Legatus occidi poterit, non per modum pænæ, sed per modum naturalis defensionis.

Vid. *Gentiles de Legat lib. 2. cap. 18. 10. Paschalium cap 74. Libellum qui inscribitur Questio vetus & nova. Grotium lib. 2. cap. 54. Camdenum anno 1571. de Episcopo Rossni anno 1584. de D. Bernard Méndoza.*

Utrum

Utrum Princeps per interpositam personam matrimonium valide contrahat?

Maximilianus Imperator, cum aliquandiu nuptias cum Anna Britanniae Ducissa ambiisset, tandem obtinuit, ut virgo in matrimonium consentiret, & eo usque processit, ut non solum per Procuratorem, Contractus publice celebraretur, sed Ducissa prout nupta, sollemniter lecto imposita, Legatus Maximiliani in praesentia quamplurium Nobilium tibiam usque ad genu nudatam, inter lintea conjugalia imponeret, cujusmodi ceremonia pro consummatione matrimonii habebatur. Carolus vero Galliae Rex, qui non minus Ducatum Britanniae regno Galliae, quam Ducissam sibi conjunctam cupiit, venali Matronarum, & Consiliatorum ope adjutus, tenerae virginis animum ad se pellexit; & primo Contractum Matrimonii cum Maximiliano invalidum arguit, quod cum Ducissa in clientela, & tutela esset Regis Galliae, ipsam nisi ejus autoritate, & consensu obligare non possit. Deinde Theologos invenit, qui fictum matrimonii consummandi modum, potius inane commentum aulicum, quam ritum Ecclesiae approbatum pronuntiarent. Ita ut Ducissa hujusmodi rationibus permota, & Regem aetate florentem, sponsum potius, quam hostem habendum ducens, relicto Maximiliano, in nuptias cum Carolo convolvit. Unde pro joco ferebatur, Maximilianum viduum, frigiditatis nimiae conscium procum fuisse, qui per Procuratorem matrimonium inire satis haberet, cum non magno itinere peracto, ipse extra omnem controversiam negotium conficere potuisset. Alii vero, rei gestae æquiores aestimatores, censuerunt injuriam insignem Maximiliano illatam, quæ si vires pares fuissent justissimam belli & ultionis causam præbuisset

Vid. S. Albanum in Historia Henri septimi.

An sacerdos inire licent cum iis qui alieni sunt a Religione?

A Propheta reprehensus est Asa, quod ad societatem Syri se contulisset; & Paulus, Ne jugum ducite cum alienis à fide. Reprehensus est Asa, quod Deo diffusus est. & Paulus prohibet

bet conjugia cum Idololatrâ, unde majus imminet periculum, ne verâ Religioni difficultas injiciatur. Sed fœdus non nocendi causa cum alienis à Religione contrahere semper licuit. Fœdera quoque Commerciorum, & similium ad utilitatem communem quin cum prophanis inire liceat, nihil reperitur. Et quod ad societatem bellicam attinet, constat Asinonæos cum Lacedæmoniis, & Romanis pepigisse, approbantibus Sacerdotibus, & Populo. Excipiendum tamen, si ex tali societate prophana opes magnum incrementum habitura sint, multò magis, si contra homines ejusdem Religionis arma inferantur: ita Alexander apud Arrianum dicit, graviter eos peccare, qui Barbaris contra Græcos militant.

Vid. Grotium lib. 2. cap. 15 § 8.9 &c. Gentilem lib. 3. cap. 19. Bodinum lib. 5. cap. ult. Guil. Guiz. alliances du Roy Très-chrétien avec le Turc justifiées contre les Calomnies des Espagnols.

An Princeps qui promissis auxilia, cum commodè non possit, præstare teneatur?

ANno 1585. Inter Elizabetham Reginam Angliæ & Ordines confederatos Belgicæ conventum est, ut Regina mitteret auxiliares copias, Equitum & Peditum, sub Gubernatore, & durante bello stipendia solveret, quæ Ordines, pace restituta, rependerent, in cautionem interim urbes quædam & propugnacula in manus Reginæ traderentur. Anno 1595. per Thomam Bodleium Legatum, Regina exponit, Angliam viris militaribus & opibus esse exhaustam ex diuturno bello; Poposcit igitur, ut expensarum onere pro copiis militaribus ipsam levarent, & partem aliquam expensarum rependerent. Ordines partem aliquam pecuniæ repræsentare promittunt, cum illa majorem postularet. Illi ex contractu contenderunt, pecuniam non repræsentandam priusquam bellum finiretur, nec à pacto resiliendum, si Regina honori consulat. Contrâ censuit illa, ex Jurisconsultorum, & Politicorum oraculis, Omnem conventionem quamvis juratam intelligi rebus in eodem statu permanentibus. Fortius quem obligari reipub. quam propriæ promissioni. Principes non teneri ex suo contractu, quando contractus cedit in publicum detrimentum. Bodleius eo Ordines perduxit, ut tantæ Principis iracundiam formidantes, promitterent, se velle Reginam

ginam quamprimùm levare omnibus expensis, quas in Anglorum copias auxiliares facit, & vicies mille librarum ad aliquot annos perfolvere.

Vid. Camdenum anno 1585. Eundem anno 1595. Cecilii altercationem cum Gallis apud eundem anno 1598.

An Commerciis sive Negotiationis privilegia, de quibus cum exercis convenit, revocare liceat?

HANSEATICA Civitates apud Imperatorem, et Ordines Imperii Anno 1595. conquerebantur. Privilegia, olim ab Angliæ Regibus indulta, antiquata esse. Elizabetha Regina per Christophorum Perkinum, respondebat. Privilegia illa propter abusum, & causas alias rationabiles, autoritate Parliamentaria, regnante Edwardo sexto, uti temporibus minus commoda, refixa esse; concessa scilicet cum res nautica, & mercatoria apud Anglos jaceret, ideoque eorum usum regnante Maria omnino fuisse inhibitum; Reginam primis regni annis alia nonnulla iis aliquandiu, ut temporum rationes tulerunt, indulgisse, donec ipsi Anglos, ne quidem præmonitos, Hamburgo (nulla amicitiae ratione habita) nulla ex causa, exturbârunt; postea tamen statuisse, easdem negotiandi rationes, quibus Angli utuntur concedere, Illos vero omnino recusasse, nisi meliori jure uterentur: Cum non alicubi sit consuetum, nec ferendum ut Alienigenæ, in earum rerum Commercio, quæ cuique regioni peculiares, indigenis præferantur, quod ex privilegio illi vendicant.

Vid. Camdenum anno 1597. Eundem de Legatione ad Regem Poloniæ eodem anno.

Utrum Fœdus, quo tantum est de Sociis, ad futuros socios sit extendendum?

POST bellum de Sicilia inter Populum Romanum, & Carthaginenses, ita fœdere cavebatur; utriusque populi Socii, ab utroque populo tuti sunt. Romani post fœdus Saguntinos socios acceperunt, quos Annibal deinde oppugnavit. Livius, satis cautum, inquit, erat Saguntinis, Sociis utrinque exceptis. Nam neque dictum erat, iis qui tunc essent; Et cum assumere novos liceret, quis æquum censeret, receptos in fidem non defendi?

O

Censet

Censet tamen Grotius futuros socios non comprehendi, quia agitur de fœdere rumpendo, quæ odiosa est materia; & de adimenda libertate Carthaginiensibus, eos, qui ipsis injuriam fecisse crederentur, armis coercendi, quæ libertas est naturalis, nec temere abdicata censetur.

Vid. Grotium lib. 2. cap. 16. Gentilem lib. 1. cap. 22.

Si Socii bellum gerant, utris potius auxilium sit ferendum?

DEmosthenes censuit, Athenienses, Messeniis sociis, contra Lacedæmonios etiam socios, opem ferre debere, si ab his inca perit injuria; Quod si fœderati committantur inter se invicem, utrinque injustis de causis (quod accidere potest) utraq; parte abstinendum est. Quod si contra alios, non fœderatos scilicet, bellent, justa quisque de causa, si utrique auxilia mitti possunt, utpote in milite, vel pecunia, utrique mittenda sunt. At si ipsius qui promisit, præsentia requiratur, quæ individua est, ratio postulat, ut is præferatur, cum quo fœdus est antiquius.

Vid. Grotium lib. 2. cap. 15. §. 13. Bodinum lib. 5. cap. ult.; Gentilem lib. 3. cap. 16. latè &c.

An ex Fœdere teneantur successores?

Fœdere inter Carolum quintum Imperatorem, & Henricum octavum Regem Angliæ anno 1542. inito conventum erat, ut si Provinciæ Belgicæ bello infestarentur, Rex Angliæ quinque millia peditum, in quatuor menses suppeditaret. Henrico defuncto, cum Rex Galliæ Luxemburgiam invaderet, Imperator ab Edvardo sexto Angliæ Rege, ex eo fœdere copias auxiliares, deposcit, à quibus præstandis, cum Rex ex aliis nonnullis rationibus liber haberetur, satis visum est, Quod fœdus cum persona paciscentis extinguatur. Ita Fidenates post mortem Romuli, à fœdere cum eo contracto, se immunes profitebantur: Latini post mortem Tulli, Hetrusci post mortem Prisci, Sabini post mortem Servii, fœdere nexibus se solutos venditabant, & quamvis Pacis, & Amicitia Fœdera perpetua

petua haberi possunt, Mutui tamen auxilii conventiones, magis temporales existimantur, præcipuè cum quid reipub. grave spondetur. Grotius vero sic distinguit; Si Principes pro se simpliciter consentiunt, Personale est fœdus, & cum persona paciscentis extinguitur. Quod si Principes pro se & successoribus promittant, diuturnius est; item si adjectum sit, ut sit perpetuum, vel ad tempus definitum, vel in bonum regni, vel si cum populo libero contrahatur.

Vid. Heywardum in *Histor. Edwardi sexti* Grotium lib. 2. cap. 16 § 16. Gentilem lib. 3. cap. 22. Ayalum lib. 1. cap. 7. nu. 10. Bodinum lib. 1. cap. 8. nu. 103.

An Conventiones, & fœdera inter Principes strictam, an ex æquo & bono interpretationem accipiant?

Aliqui asserunt nullos esse Bonæ fidei contractus qui in jure Civili, ubi contractus bonæ fidei recensentur, non sunt nominati. In jure Civili ubi recensentur ejusmodi contractus, agitur duntaxat de privato jure, non de publico, & quod extra Civitatem extenditur; at Tullius ait Fœciali jure æquitatem esse præscriptam; & Alciatus quod in contractibus Principum, exuberantior fides requiritur; & Baldus affirmat, omnia cum Principibus aut cum Procuratoribus Principum gesta, esse bonæ fidei, & respuere scrupulosas interpretationes, & disputationes de Apicibus juris, quibus longe abesse debent, quos oportet solam veritatem, quam jus gentium colit, intueri. Itaque exprobatum est Carolo quinto, & Ludovico Gallix Regi, quod verborum ac pactorum interpretationes afferrent, non Principibus, sed Leguleis dignas.

Vid. Gentilem lib. 2. cap. 13. Eundem lib. 3. cap. 14. Grotium lib. 2. cap. 16 § 10.

An Juramentum dolo elicium obliget?

Iosue & Principes Israelitici, Gabeonitis, se è regione longinqua venire fingentibus, juramento se iis parciuros obligârunt, quod etiam, cum scirent se deceptos, observârunt. Ita statuit Grotius. Si certum sit, eum qui juravit aliquid factum supposuisse, quod revera ita se non habeat, ac nisi id credidisset, non fuisse juraturum,

non obligabit iuramentum. At si dubium sit, an non etiam sine eo, idem juraturus fuisset, standum erit verbis, quia simplicitas quam maximè iuramento convenit; Quod de Josua, & primoribus Israeliticis conijcere licet. Lex enim Divina, quæ eos internecioni devotebat, ex Legis alterius comparatione, ita erat intelligenda, ut locum haberet, Nisi si qui statim facerent imperata. Quare, cum credibile esset, si rem ipsam Gabeonitæ indicassent, (quod pro metu non fecerunt) eos vitam salvam, sub parendi conditione, impetraturos fuisse, valuit Jus iurandum.

Vid. Grotium lib. 2. cap. 13. §. 4. Gentilem lib. 2. cap. 5. et 3. c. 19.

An iuramentum metu extortum obliget?

LAUDAT Cicero Pomponium Tribunum, qui observavit, quod metu coactus juravit; Tantum, inquit, illis temporibus Jusjurandum valebat. At etsi is qui metum intulit, nullum jus consequatur, quia causam damno dedit, nihilominus qui juravit obligatur stare jurejurando; sic videmus Hebræos Reges, à Prophetis increpatos, quod fidem juratam Regibus Babylonius non servassent

Vid. Grotium lib. 2. cap. 13. §. 4.

S E C T. V.

De quæstionibus Delicti inter eos quibuscum Pax est.

Quæstiones de Delicto inter eos quibuscum Pax est, sunt, veluti cum quaeritur. Qui nam ex Delictis teneantur? Item, an contra Statum, Dominium, vel Debitum quid admittatur?

Utrum Injuria à Subditis illata Principem vel populum afficiant?

CUM Scyrii, Theffalos qui ad mercaturam venerant violassent, mercibus spoliassent, & in carcerem conjecissent, Theffali elapsi rem ad Amphyctionas detulerunt. Iis visum est, ut communem.

munem, non ut privatam injuriam vindicandam, quod Scyrii procurare debuerunt, ut Peregrini apud se liberi & securi negotiantur. Cum vero Rectores Belgia, potestatem prædarum in mari ex hoste agendarum, per Codicillos plurimis dedissent, et eorum nonnulli, res Pomeranorum, qui Amici erant, rapuissent, defertaq; patria, mari vagarentur, Pomerani, eo nomine, contra Rectores questi sunt. Sed in ea causa Grotius consuluit, Eos in nihil amplius teneri, quam ut noxios, si reperiri possent, dederent; præterea, in bona raptorum jus reddi curarent, Nam ut sine culpa sua ex ministrorum factis quis teneatur, non esse juris gentium. Itaque Rhodii apud Senatum, à privatorum causa, publicam segregant. Dicentes, Nullam Civitatem esse, quæ non improbos Cives aliquando habeat; Qui vero scit subditos delinquere, & prohibere potest, nec prohibet, tenetur: ita Agapetus apud Justinianum; Par est delinquere, & delinquentes non prohibere.

Vid. *Ærodius Decret. lib. 2. tit. 3. c. 1. Grotium lib. 2. cap. 13. § 10. Eundem lib. 3. cap. 21. §. 2. Gentilem lib. 1. cap. 21.*

Utrum Delictum Principi sit impusandum, qui alibi delinquentes recipit?

Quintus Martius Legatus Romanorum, Perseo Macedonum Regi, pro crimine contra Romanos admisso, objecit, quod interfectores Arterati, omnium Illyricorum fidissimi Romanorum nomini Reguli, recepisset. Cui respondit Perseus, Arterati cædis mihi reddenda est ratio, cum nihil ultra obijciatur, quam interfectores ejus in regno meo exulasse. Cujus conditionis iniquitatem, non sum recusaturus, si vos quoque accipitis, ut quicumque in Italiam, vel Romam se contulerunt, his, facinorum propter quæ damnati sunt, authores vos fuisse fateamini. Si hoc, & vos recusabitis, & alix omnes gentes, Ego quoque inter ceteros ero. Et herculè, quid attinet cuiquam exilium patere, si nusquam exuli futurus sit locus? Ego tamen istos, ut primum in Macedonia esse, admonitus comperi, requisitos regno abire jussi, & in perpetuum interdixi finibus meis.

Vid. *Livium Decad 5. lib. 2.*

O 3.

Utrum

Utrum Profugum delicti in patria reum, Princeps territorii in quo reperiens est remittere teneatur?

Cum quidam Stywarcus Scotus, qui Mariam Scotorum Reginam veneno tollere conatus esset, in Anglia deprehenderetur, Edvardus sextus, Rex Angliæ, eum in manus Regis Galliæ tradidit, ut debito supplicio remitteretur. Quod nonnullis displicuit; Quia, etsi ratio suadeat, ut qui in patria deliquit, in patria puniatur, aliter tamen de consuetudine, quoad remissionem, usurpatum est. Itaque cum Edvardus Staffordus, Elizabethæ Reginæ apud Gallum Legatus, à Rege Galliæ peteret, ut Morganus, & alii Angli, in Principem & patriam machinantes, è Galliæ submoverentur, responsum tulit, si quid in Galliæ machinarentur, Regem ex jure in illos animadversurum, sin in Anglia quid machinati fuerint, Regem non posse de iisdem cognoscere, & ex jure agere; omnia regna profugis esse libera; Regum interesse, ut sui quisque regni libertates tueatur; imo Elizabetham non ita pridem, Montgomerium, Principem Condzum, & alios è gente Gallica admisisse, & hoc ipso tempore Segurium Galli Legatum, novis rebus in Gallum studentem, in Angliā hærere. Et proinde in fœderibus sæpe cautum est, ut subditi delinquentes, si petantur, remittantur.

Vid. Haywardum in Historia Edu. sexti Camden. anno 1584. Tractatum inter Henricum septimum Regem Angliæ, & Philippum Regem Hispaniæ de remittendo Comitē Suffolciæ in Historia Vicecom. S. Albani anno 19 Henrici sep.

Utrum pro Delicto universitatis teneantur successores.

ARIANUS damnat vindictam Alexandri in Persas, cum pridem interiissent: qui in Græcos peccaverant; & simile est Curtii iudicium de excidio Branchidarum, per eundem Alexandrum. sed videtur, Quod pœna ob delictum universitatis exigi possit, quamdiu durat universitas, quia idem corpus manet, quanquam particulis succedentibus; Contrarium tamen verius. & Ratio est: Quia extinctis illis, per quos Meritum ad universitatem deducebatur, ipsum quoque meritum extinguatur, ac proinde etiam pœnæ debitum

debitum, quod sine merito non consistit.

Vid. Grotium, lib 2. cap. 21. Gentilem, lib. 1. cap. 24.

Utrum a Principe ulciscenda sint injuria quas cum privatus esset à subditis sustinuit?

Cum Henricus, ejus nominis tertius, Rex Galliarum, à Polonia revertebatur, Hubertus Lanquettus, qui tunc Viennæ agebat, literis ad Philippum Sydnæum, in Italia peregrinantem, ita scripsit. videbimus, quid sit facturus hic Rex ubi in Galliam redierit; Nam omnes qui sunt ei familiares dicunt eum constituisse, benigne ignorare omnibus, qui aliquid commiserunt, ob quod merito ipsis succensere possit, & complecti omnes benevolentia qui eam exoptabunt. Quod utinam dicat ex animo, & faciat, Nemo enim strepitu abigit aves, quas suis retibus involvere cupit. Utinam imitaretur exemplum proavi sui, Ludovici duodecimi, cui cum, Carolo octavo regnante, multi non solum essent adversati, sed etiam in capitis periculum ipsum adduxissent, omnibus tamen bona fide ignoravit, ubi ad regnum pervenit, & mirantibus amicis, quod tot acceptas injurias non ulcisceretur, respondit, injurias factas Duci Aurelianensi nihil pertinere ad regem Galliarum. Nec secus Elizabetha quæ Maria sorore regnante in custodiam tradita, ab Henrico Benningfeldio Equite durius quam pro Dignitate tractabatur, cum in regnum Angliæ successit, nihil gravius in ipsum statuit quam quod, ejus indignationem deprecanti, dixerit, Domum in pace rediret; se, cum severiore carceris custode opus haberet, ipsum accersurum.

Vid. Lanquettum Epist. 34. ad Philippum Sydnæum. Camden. in apparat. Elizabethæ. Foxium in Martyrol. de Maria Regina.

Utrum contra Assassiniam committat, qui vires auget aut in suo arcem facit?

Romani contra Philippum Macedonem, & Lysimachus contra Demetrium, ex hujusmodi causis arma sumpserunt. Et quidam tradunt jure gentium, arma recte sumi ad minuendam potentiam crescentem

crescentem, quæ nimium aucta nocere potest, Grotius vero ait, ab Æquitatis ratione abhorre, ut vim pati posse ad vim inferendam jus tribuat, & ideo contrariæ in suo munitiones, & si quæ sunt similia remedia querenda, non vim bellicam. Alibi cum amicitia pugnare aasserit, Arces in finibus non tuendi, sed nocendi causa extruere; Item insolitam copiarum inscriptionem; si iustis satis indiciiis appareat, non alium in finem hæc, quam contra eum qui cum pax est comparari.

Vid. Grotium lib. 2. cap. 1. §. 17. eund. lib. 3. c. 20. §. 40. Gentilem lib. 1. cap. 14.

An sit contra Amicitiam subditos alienos recipere?

Subditos singulos qui ex altera ditione, in alteram migrare volunt, suscipere, non est contra amicitiam, neque enim naturalis tantum, sed & favorabilis ista libertas est. Oppida autem, aut magnos catus, qui Civitatis partem integram faciant admittere non licet. Sicut aliud est ex flumine haurire, aliud rivum deducere.

Vid. Grotium lib. 3. cap. 2. §. 41.

An iis quibuscum est Amicitia transitus sit denegandus?

Agesilaus ex Asia rediens, cum à Rege Macedonum transitum postulasset, atque is consultaturum se dixisset. Consulatus, inquit, interim nos transibimus, nec quicquam durius eum pettrasse constat. Et videtur aliquando, transitum denegari posse, utpote 1º Si cum armatis transitus requiratur; ita Veneti negarunt Maximiliano primo, qui cum exercitu petebat ire Romam, ad Imperii coronam accipiendam, & causabantur Veneti, Rem pacis non egere armatis. 2º Iuste negatur transitus, iis qui hostes adducunt; Ita Antonio secum ducenti hostem, Brundisini portas clauferunt; & idem fecerunt Carthaginenses filio Massanißæ. 3º Si non à Principe territorii petatur transitus; ita cum Cymon Lacedæmoniis suppetias laturus, per agrum Corinthium copias traduxerat, reprehensus est à Corinthiis quod non Civitatem compellasset, At vos, inquit,

inquit Cymon, Megarenſium fores non pulſaſtis, ſed fregiſtis, cenſentes omnia licere plus valentibus.

Vid. Grotium, lib. 2. cap. 2. §. 13. Gentilem, lib. 1. cap. 19.

An iis quibuſcum eſt Amicitia Commertium interdicere liceat?

Non videtur Commertium negari, cum modus aſiquis Commertii non admittitur, ſed cum omnino Commertium prohibetur. Quid enim ſi negetur importari, quod incolis videtur improbum, vel contra Religionem, vel Diſciplinam Religionis? Ita, quæ ad effaminandos animos conducunt, ea mercatores ad Belgas aliquando non adferebant. 2º. Etiam licitum videtur, prohibere aliqua exportari, ut aurum, & argentum, ne Provinciæ exhauriantur; ſic Hiſpanus alicubi Regnorum ſuorum, ſic Angluſ facit. 3. In tantum Commertium vetare licet, ne Mercatoribus ad penitiora regni, adituſ concedatur: Quod olim Britanni, nunc Siſenſes non permittere, dicuntur.

Vid. Gentilem, lib. 1. cap. 19. Bodinum, lib. 1. cap. 7. Grotium, lib. 2. cap. 2. §. 11, & 12.

An res alienæ aliquando inviſis Dominis capere liceat?

Qui bellum gerit locum occupare poteſt in territorio alieno, ſi certum ſit periculum, ne hoſtis eundem locum invadat, & inde damnum det. Et Græci, qui cum Xenophonte erant, cum navibus omnino opus haberent, cæperunt tranſeuntē; ſed ita, ut merces Dominis intactas conſervarent, & nautis etiam alimenta darent, & pretium perſolverent: Sed &, An qui rei alienæ uſum imperat; ad caſuſ fortuitoſ teneatur, aliquando quaſitum eſt. Ita cum navis Anglica ad Etruſcum littuſ onerata eſſet, & velificatura in Angliam, juffu Ducis Hetrurix exonerata, in bellum mittitur, unde revertens in itinere periit. Angli damnum illud ab Etruſco reſarciri petierunt. In caſu conſimili Navis quam Princepſ in uſum ſuum à ſubditis cæpit, cum caſu periſſet, Doctores tradunt Principem ad damnum obligari. Quod multo magis obtinere debet,

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in subditis alienis. Hetruscus vero contendebat, se navem conduxisse, & Conductorem non teneri ad casus fortuitos. Item se pollicitum præstare, quod in actu militari contingeret. Navem autem non illic periisse; Pro Anglis responsum, revera Hetruscum non conduxisse, sed coegisse pro imperio; & quod ita actum est, magis ad mandatum, quam ad conductionem accedere. Et de jure mandans præstat casus fortuitos mandatario. Nec pactio mercedis locationem facit; cum, ut ait Tacitus, Merces ab eo qui jubere potest, vim necessitatis adferat. Deinde quod promissio de præstando casu in actu bellico, non excludat casum verisimilem, maxime in Contractu Bonæ fidei.

Vid. *Grotium lib. 2. cap. 2. nu. 10.* • *Gentilem Advocat. Hispan. lib. 2. cap. 26.*

Utrum Exteris aliquando territorium alicuius invadere liceat?

SI quid intra territorium alterius populi, est deserti, ab Advenis occupari potest: Cum ab aliis occupatum non censeatur, quod non excolitur. Ita olim clamabant Ansibarii, Sicut cælum Diis, ita terras genti mortalium datas, quæq; sunt vacua, ea esse publica. Sed & Habitatio his, qui suis sedibus expulsi sunt, non est deneganda, motu imperium quod constitutum est subeant, & alia quæ ad vitandas seditiones necessaria sunt præstent.

Vid. *Grotium lib. 2. cap. 2. Sect. 15, & 17.* • *Gentilem lib. 2. cap. 17.*

Utrum Exteris oppressis contra Socios auxilium ferre liceat?

Qui Civium rationem habendum dicunt, exterorum negant: Hi, inquit Cicero, Communionem & Societatem humani generis dirimunt. Et Lazii Persarum Regi dixerunt, non eum propterea justum, quod faceret injuste nihil, nisi & injuste oppressos defenderet; & sic ab eo Exercitus, & auxilia contra Romanos impetrârunt. Videndum tamen, an non hujusmodi Societati communi, per Societatem specialem derogetur. Itaque cum Samnites, quibuscum Romani fœdere & amicitia conjuncti erant, Campanos à Romanis alienos injustis bellis urgerent, & Campani viri-
bus

bus impares, ad Romanorum copias, & Opes confugerent; Consul, Senatus auctoritate, Legatis respondit; Auxilio vos, Campani, dignos Senatus censeat; sed ita vobiscum amicitiam constitui par est, ne qua vetustior amicitia violetur: Samnites nobiscum fœdere juncti sunt; itaque arma, Deos prius quam homines violatura, vobis negamus. Legatos, sicut fas est, precatum ad Socios mittemus, ne qua vobis vis fiat. Accepto responso, Legati Campanorum, quod in mandatis habebant, hæc verba fecerunt: Quandoquidem nostra tueri non vultis, vestra certè defendetis; Itaque populum Campanum, Urbem Capuam, agros, Delubra Deum, divina humanaq; omnia, in vestram, Patres conscripti, populiq; Romani ditionem dedimus; tum jam agi fides visa est, deditos non prodi.

Vid. Bodinum lib. 5. cap. ult. Gentilem, lib. 1. cap. 15. Grotium, lib. 2. cap. 25. Sect. 4. & c.

An promissa in fœdere aliquando liceat non observare?

SI pars altera in fœdere sefellerit, potest altera discedere: Quia Capita singula fœderis conditionis vim habent. Ita Thucydides; Soluti fœderis culpam sustinent, non qui deserti ad alios se conferunt, sed qui opem quam promiserunt non præstant. Sed & fœderatum excusabit necessitas, & vis major, ut non fœdisfragus judicetur.

Vid. Grotium, lib. 2. cap. 15. sect. 15. Gentilem, lib. 3. cap. 24. Ayalam, lib. 1. cap. 6. nu. 17.

S E C T. VI

De Quaestionibus Belli.

Quaestiones de Bello sunt, in quibus quaritur in genere, veluti; An aliquod sit licitum? An utrinque; justum esse possit? An moveri possit ab iis qui imperium non habent? An ex causis minus justis?

An Bellum aliquod sit licitum?

Plutarchus in Stoicorum contradictionibus, ait, nullum inter homines bellum, non ex vitio nasci: Aliud ex voluptatum cupiditate; aliud ex bonorum, aut imperii nimio studio, constare: Livius tamen, Jure gentium, inquit, comparatum est, ut Arma armis propulsemur; & Florentinus Jureconsultus, Jus gentium esse, ait, ut vim atque injuriam propulsemus; cui & Hermogenianus, & Caius suffragantur.

Vid. Grotium, lib. 1. cap. 2. per totum. Gentilem, lib. 1. cap. 15. Ayalam in Praefatione.

An Bellum utrinque; justum esse possit?

Iustum, aliquid dicitur, aut respectu operis, aut respectu operantis; respectu Operis, bellum utrinque; justum esse non potest. At, ut neuter bellantium injuste agat, fieri potest. Injustè enim nemo agit, nisi qui scit, se injustè agere; sic justè, id est, bona fide, utrinque; litigari potest: In bello suscipiendo, ea est negotii gravitas, ut probabilibus causis non contenta, quam maximè evidentes requirat.

Vid. Grotium, lib. 2. cap. 23. sect. 13. Gentilem, lib. 1. cap. 6.

An

An Bellum moveri possit ab eo, qui supremam potestatem non habet?

A Legatis suis accusatus fuit Cneius Manlius, quod populi Romani injussu, bellum Gallo-Græcis intulisset; & Caium Cæsarem, quod eodem modo Germanos prosequutus fuisset, Germanis dedendum, Cato censuit: Germani vero, inquit Grotius, jus non habebant deditionem postulandi; sed populo Romano eum punire jus erat: prout Carthaginiensis Romanis respondit; Ego, privato, an publico consilio Saguntum oppugnatum sit, non quaerendum censeo; sed utrum jure, an injuria? Nostra enim hæc quaestio est, atque animadversio, vobiscum una disputatio est, licueritne per foedus fieri.

Vid. Grotium, lib. 1. cap. 3. sect. 5. Gentilem, lib. 1. cap. 3. Ayalam, lib. 1. cap. 2. nu. 7.

An ex causa vetusta bellum movere liceat?

Polybius, & Livius Annibalem reprehendunt, quod moturus in Romanos bellum, causam belli non prætenderet, ablatam Sardiniam: sed alias causas Saguntinas, inanes, & ratione carentes; Eorum vero judicium, Gentilis non probat. Nam etsi, inquit, causa fuerit vera quod dedecori fuit Carthaginiensibus, sibi ablatum mare, & raptas insulas; at de his transactum fuit: & magis probat Annibalis judicium, qui ex recenti causa, contra Romanorum Socios bellum movit, quod scilicet ejus hostibus subsidio & perfugio fuissent; atque ita, ait, Romanos contra Philippum Macedoniæ Regem, causam belli, non priores injurias ab eo illatas, sed præsentem statum Græciæ ostendisse (ita Zonaras) eam causam prætendentes, quod Philippus Græciam invasisset; sed revera ob priores injurias.

Vid. Gentilem, lib. 2. cap. 22.

Utrum Elizabetha Regina Angliæ, Belgarum contra Regem Hispanum, patrociniū iuste suscepit?

ANno Salutis, 1575. Fœderati Belgii Ordines, per Legatos, Elizabethæ Reginz Angliæ, Hollandiam & Zelandiam, vel possidendas, vel protegendas offerunt; uti Principi ex Hollandiæ Principibus prognatæ: Illa re maturè deliberata, respondit, Nihil sibi antiquius esse, quam fidem cum honore conjunctam, & Principe dignam tueri; Necdum sibi constare, quomodo salvo honore, & Conscientia integra posset provincias illas oblatas, in possessionem vel protectionem accipere. Cæterum apud Hispanum sedulo acturam, ut Pax feliciter coalesceret. Anno deinde, 1585. Eorundem Ordinum Delegati, eandem pluribus obtestantur, ut confœderatarum Belgii provinciarum Dominium, populumq; Belgicum indignissimè oppressum, in protectionem, & clientelam susciperet: Illa primum Dominium, & Protectionem recusat. Tandem postquam illius curæ, & cogitationes in hoc excubassent, ipsaq; gravem Hispanorum in Belgas sævitiam, & odium in Religionem quam colebat, considerasset; ne Hispani potentia plus nimis diffunderetur in regionibus fere contiguīs, quæ situ sunt percommodæ ad bellum in Angliam transferendum, statuit Pietatis esse, afflictis Belgis subvenire; & Prudentiæ, exitiosas hostiū machinationes prævertendo populi sibi commissi incolumitati consulere; unde Belgarum patrociniū palam suscepit. De quo minus erat quod Hispanus quereretur, quod anno 1569 Cum Boteleri, Comitissæ Ormondæ fratres, cum aliis seditionem in Hibernia concitarent; Pontifex Romanus, & Hispanus, cum iis, de assèrenda religione, & deturbanda Elizabetha Hiberniæ regno, fœdus iniissent; Et circa idem tempus, cum Norfolci in Angliā res novas moliretur, Idem, hortatu Pii quinti, qui zelo Religionem Romanam in Angliā restituendi, simulq; Elizabetham è regno submovendi flagrabat, Chapinum Vitellium, cum armata manu, è Belgio in Angliā submittere destinaret; & in eum finem, Ridolphum Florentinum; Pontificis ministrum, cum pecunia in Belgium miserat: quod testatur Hieronimus Catena in vita Pii Quinti.

Vid. Camdeam anno 1575, Eundem, anno 1585. Eundem, anno 1569, & 1572.
Utrum

Utrum subditis, contra legitimum regni successorem, Religioni causa conjurare liceat?

Cum Henricus tertius Rex Gallia, prolem non haberet, & successio in regno, Navarro, & post Condæ, Reformatæ religionis propugnatoribus, ex jure deberetur, Pontificii Gallia Principes, Pontifice & Hispano consciis, conjurationem occulte inierunt, sub religionis Catholica tuendæ velo, nomine Sacra Ligæ, five Unionis, ad Reformatam Religionem funditus extirpandum. Qui in hanc nomina dederunt, fidem mutuam jurejurando obstrinxerunt; se neutiquam in Gallia quenquam regnare passuros, qui aliam Religionem, quam Catholicam Romanam, professus fuisset, aut profiteri vellet; neque eum admissuros, qui in alia enutritus, etiam si eam abjuraret, ne regnum adeptus Religionem avitam labefactaret. Quæ singula ad excludendum Navarrum, & agnatum Condæ spectasse nemo dubitavit. Conjurationis patroni contendunt, jus successionis in regno ratione sanguinis, à legibus humanis pendere, quas populus mutare possit; in successore alias qualitates, præter proximitatem sanguinis spectandas, ne ineptus ad gubernandum, ad regnum promoveatur; Religionem, & cultum Dei præcipuum cuiusque reipub. finem esse, & proinde ab omnibus cavendum, ne Principem admittant qui à vera Religione alienus est, & quem cultui divino inimicum suspicentur. Ex parte adversa asseritur, utcumq; in regnis, ubi successores per Electionem sufficiuntur, populi jus sit de idoneis statuere, in regnis quibus hereditario jure succeditur jus quod ex sanguine competit, nemini auferendum: Cum Lyfander Lacedæmone legem rogaret, ut maximè idoneus, non proximus Herculei sanguinis in regno succederet, uti Plutarchus refert, neminem invenit qui ejus sententiæ suffragaretur. Et cum inter Hyrcanum & Aristobulum fratres de regno Judææ contentio haberetur, Pompeius, cujus arbitrio lis deferebatur, quod Josephus tradit, Hyrcanum seniore, etsi minus idoneum, Aristobulo juniore prætulit. Religionis causa nihil injustum peragendum. Ambrosius, cum injuriam non sibi tantum, sed & Gregi suo, & Christo, fieri crederet à Valentino, Valentini filio, populi satis concitati motu, ad resistendum uti noluit.

Vid. Camdenum anno 1581. parsonium sub nomine Doleman de successore, Io. hannem Haywardum contra Dolemannum Groitum lib. 1 cap 4 nu. 5 167.

An

An repræſaliæ ſint licitæ?

Imperator Zeno, æquitati naturali contrarium dicit, ut pro alieno debito, alii moleſtentur; & in Novella Juſtiniani prohibentur Pignorationes pro aliis: addita cauſa, Quod rationem non habet, alium eſſe debitorem, alium exigi: Jure tamen gentium introductum apparet, ut pro eo quod præſtare debet Civilis Societas, aut ejus caput, ſive per ſe primo, ſive quod alieno debito jus non reddendo, ſe obſtrinxerint, obligata ſint bona omnium ſubditorum.

Vid. *Grotium lib. 3. cap. 2. §. 1. & 2. Gentilem lib. 1. cap. 21. Ayalam lib. 1. cap. 4.*

SECT. VII.

De Quæſtionibus Status inter eos quibuscum Bellum.

Quæſtiones de Statu, inter eos quibuscum Bellum intercedit, ſunt, cum de Conditione Principis, populi, vel ſubditorum circa bellum dubitatur, utpote an aliqui Hoſtes habendi ſint, An Inimici ab origine, an a Domicilio habendi ſint.

An hoſtes habendi ſint qui contra Naturam delinquant?

Hercules, narrante Diodoro, veteres Gallos, qui carnes humanas epulabantur, ab eo more abſtinere coegit, & Alexander Sogdianos, qui in parentes erant impii, domuit: Vaſquius vero Molina, & alii ad juſtitiam belli requirunt, ut qui ſuſcipit læſus ſit, aut ut in eum qui delinquit, imperium habeat. Sed ſciendum eſt, Reges, non ſolum ob injurias in ſe, aut ſubditos ſuos commiſſas pœnas poſcendi jus habere, ſed & ob eas, quæ in quibuſvis perſonis jus Naturæ, aut gentium inhumaniter violant; cum poteſtas puniendi, non ſolummodo ſit effectus juris Civilis, ſed veniat etiam ex jure Naturali. Hujusmodi vero bella, quæ ad pœnam exigendam ſuſcipiuntur, facile injuſtiæ argui poſſunt, niſi ſcelera ſint atrociffima, & maniſeſtiſſima.

Vid. *Grotium lib. 2. cap. 20. §. 40. Gentilem lib. 2. cap. 2.*

An

An Hostes habendi sint qui alieni sunt à Religione?

Darius Rex Persarum Carthageneses, qui Deos hominum innocentum sanguine adorabant bello prosequutus est. Et inter alias causas Belli Peloponesiaci, inter Athenienses, & Lacedæmonios, una perhibetur, quod in eos quos Deos putabant, irreverentes essent. Ad Delicta tamen quæ in Deum committuntur, vindicanda, bellum justè suscipi, post alios, negat Covarruvias. Statuitur vero, eos nomine humanæ Societatis, coerceri posse, 1° Qui Cacodæmonas, aut homines flagitiosos colunt. 2° Qui numen esse, aut ab eo res hominum curari dissidentur. 3° Qui Christianismum profitentes prosequuntur; ita Constantinus Licinio, Imperatores alii Persis bellum intulerunt, quod Christianos pænis subjicerent. Arma justè non inferri iis, qui Christianam Religionem non amplectuntur, quod Religio Christiana naturalibus argumentis persuaderi non potest; nedum iis qui Christianismum profitentes, de quibusdam quæ aut extra Legem Christi sunt, aut in Lege sensum ambiguum habere videntur, dubitant, aut errant.

Vid. *Grotium lib. 2. cap. 20. §. 44 45. Gentilem lib. 1. cap. 8 9 10.*

An qui ab origine subditus fuit inimici, apud amicos degens amicus censendus sit?

Civi Mediolanensi, querenti de injuria à Florentinis illata, Florentiæ jus est denegatum. Quæritur An Repræfaliis concessis contra Florentinos, ejus bona capere liceat, qui Florentiæ natus, Romæ aliquandiu habitavit? & videtur quod non: quia Repræfaliæ justè concedi non possunt, nisi contra eos qui sunt in culpa, qua absentes affici non videntur; & quod cum quis participat duas qualitates, utpote ab Origine & à Domicilio, ea quæ prodest, magis inspicienda sit, maximè contra Repræfalias, quæ licet aliquando permixtæ, nunquam tamen sunt favorabiles. Alii tamen ita distinguunt. Nisi qui alibi habitat, in Civitate Originis, per se, vel suos, iubeat munera.

Vid. *Bartolum de Repræfaliis quest. 7.*

Q

An

An qui ab Origine Amici fuit subditus, apud Inimicos domicilium habens, inimicorum subditus sit habendus?

CONSTANTE inter Anglos & Venetos Amicitia, Anglus cui concessæ erant Repræsalix contra subditos Regis Hispani, intercepta bona Veneti, qui in Hispania commoratus est. Baldus per rationes in casu præcedente memoratas, ait injuste capi: Bartolus autem, prout in superiori distinctione, affirmat alibi natos, cum reliquis subditis, Repræsalis esse obnoxios, si una cum iis subeant munera. Cui assentit Grotius, qui scribit, quod jure gentium Pignorationi subjaceant omnes subditi injuriam facientis, qui tales sunt ex causa permanente, sive Indigenæ, sive Advenæ; non qui transeundi, aut moræ exiguæ causâ alicubi sunt; Introductæ enim sunt Pignorationes ad exemplum onerum, quæ pro exolvendis debitis publicis indicuntur.

Vid. Bartol. de Repræsal. quest. 7. Grotium, lib. 3. tit. 1. c. 7. Franciscum Nicenium in Repert. juris Civilis, ad titulum Soluti matrimonio.

Utrum ad militiam Hostium proficiscentes, tanquam Hostes tractare liceat?

CUM Lanuvini ad auxilium Latinis ferendum irent contra Romanos, & quamprimum portis egressi essent audivissent victos Latinos, statim in urbem redierunt, Audierunt tamen à Prætore suo, pro tantula via magnam mercedem solvendam esse. Et cum Caius Plinius, Trajanum Imperatorem consulere, quid statuendum esset de duobus servis, qui inter Tyrones deprehensi erant, an pœna juris iis infligenda esset (de quo ipse dubitavit) quod nondum in numeros distributi erant: Respondit Trajanus in eos animadvertendum esse, quod Dies quo probati sunt, veritatem Originis ab iis exegit: Contrarium tamen defendit Gentilis, pro quibusdam Anglis, in partes Regis Hispaniæ transeuntibus, ab Hollandis captis ne scilicet interficerentur. Quod pro hostibus habendi non sunt, qui in numeros hostium nondum sunt relati: quod ita de Militibus lex de finirat, quod militaturi erant, sub conditione, si Hispanus eos acciperet, Quod in odiosis cœptum pro completo non habetur. Lanuvinos

nuvino publico consilio fuisse profectos, atque ita Hostes fuisse quamprimum auxilium publicè decretum fuit: Et Servos de quibus Trajanus, cum probati essent, quasi in numeros relatos, etiam si iuramento nondum astricti fuissent.

Vid. Gentilem Advocat. Hispan. lib. i, cap. 9. Plinium Epist. lib. 10. Epist. 38, 39.

Utrum Exteri, qui cum Subditis contra Principem militant Rebelles sint habendi?

Cum Comes Desmonii & alii in Hiberniâ rebellionem concitassent, ad eorum auxilium Itali & Hispani missi sunt; quos cum Greius Prorex aliquamdiu obsedisset, colloquium petierunt; quod negatum, quia cum Rebellibus se conjunxerant, quibuscum non decuit colloquium admittere: Sunt tamen qui censent Neminem rebellem habendum, nisi qui subditus fuerit. Alii quoscunque qui se Rebellioni miscuerint; quemadmodum reos læsæ Majestatis, qui Majestatem lædenti operam præstant; Et Piraticæ pravitatis (etiam si alias reverà hostes) qui in navi piratica operam piratis navant.

Vid. Camdenum, anno 1580. Gentilem Advocat. Hispan. lib. 1. cap. 10. Iulium Clerum 5. sentent. Læsæ Majest. nu. 6, 7.

Utrum Belge Subditi, cum quibus Rex Hispaniæ tanquam liberis tractare consensit, à Dominio ejus immunitatem consequuti sunt?

Cum ex parte Alberti & Isabellæ Archiducum Austriæ, in quos Philippus Rex Hispaniæ, omne jus suum in Provincias Belgii transmisserat, Fœderatarum provinciarum Ordinibus, de Pace vel Indiciis tractatus proponeretur; Ordines omnino renuerant, nisi prius liberi, & sui juris agnoscerentur: unde Archiduces profitebantur, cum suo, tum Catholici Regis nomine, se paratos cum iis agere, sub ea qualitate, & Provincias fœderatas tanquam liberas agnoscentes, in quas nullum Domini jus prætendant;

idque tractatûs articulo primo, qui etiam ab Hispaniæ rege probatus fuit, declaratum. Postea cum Ordines provinciarum fœderatarum, non solum propria abdicatione Regis, sed ipsius Regis, & Archiducum agnitione, se liberos esse contenderent; pro Archiducibus & Hispano responsum: Verborum formula non absolutam libertatem Provinciis adferi, sed personis tractantibus certam ad tractandum qualitatem tribui, quam nisi induerent ne pascisci quidem cum Principibus ulla ratione potuissent: Principes, quantum ad illum tractatum duntaxat, Majestatem exuisse: Verbum *tanquam* plerumq; similitudinis, non veritatis esse notam: Nullam juris Regii cessionem, nullam Resignationem intervenisse; quæ non nisi certis formulis, & solenni juris Ordine, cum etiam de prædiis, aut rebus privatis disponitur, expediri solent: Post admissum tractatum, Ordines de ulteriori renuntiatione Imperii egisse, & Præsidem Janinum, Galliæ Regis Legatum monuisse, Principibus fas non esse, in præjudicium Successorum, Res imperii diminueret.

Vid. Baudium & puteanum de Inducis Belgiois. Patric. Armachanum Martis Gallici lib. 2. cap. 5. Gloss. & D. ad cap. Solita. v. *tanquam de Majoris, & Obcedentia.*

S E C T. VIII.

De Quæstionibus Dominii inter eos
quibuscum bellum est.

Quæstiones Dominii inter eos quibuscum Bellum est, sunt, veluti cum dubitatur, de Acquisitione particulari; ut cum res singule capiuntur, ab Hostibus, Piratis, vel aliis: & de Acquisitione universali; cum territoria, vel regna invaduntur, vel subjungantur.

An res ab hostibus capta, capientium fiant, antequam deducta sunt intra præsidium?

Cajus Jurisconsultus, ait, Quæ ex hostibus capiuntur, jure gentium statim fiunt capientium: Placuit vero gentibus, ut rem cepisse

cepisse is intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit; ut, cum res mobiles intra fines, id est, intra præsidia perductæ fuerint; cui consequens videtur, ut Naves, vel res aliæ in Mari, captæ tum demum censeantur, cum in navalia, aut portus, aut eum locum, ubi tota classis se tenet, perductæ sunt; nam tum desperari incipit recuperatio. Sed recentiori jure gentium, inter Europæos, inquit Grotius, introductum videtur, ut talia capta censeantur, ubi per horas viginti quatuor in potestate hostium fuerint: Quod Petrinus Bellus, & Gentilis minime probant.

Vid. Grotium, lib. 3. cap. 6. §. 2, 3, 4. Petrin: Bellum, part. 3. tit. 1. nu. 11. Gentilem Advocat. Hispan. lib. 1. cap. 2.

An Res ab Hostibus capte, in amicum territorium delatæ, prioribus Dominis sint restituendæ.

Naves Hispanicæ, ab Hollandis capte in portus Angliæ delatæ sunt, unde Hispani ad tribunal maritimum Angliæ provocant, & restitutionem navium, & bonorum petunt: Quia jus Postliminii, quo res prioribus Dominis restituuntur, non solum obtinet cum res in suos fines pervenerit, sed ut, Pomponius Jureconsultus ait, Si in Civitatem Sociam, Amicamve, aut ad Regem Socium, Amicumve venerit: Quia ibi primum nomine publico tuta esse incipit. Erat autem tunc temporis, Rex Angliæ Amicus Regis Hispaniæ; Grotius vero, post Gammam, hoc intelligendum esse ait, non de Amicis, aut Sociis simpliciter, quibuscum Pax est; sed de iis, qui in bello easdem partes sequuntur. Apud eos enim qui Amici sunt, sed non earundem partium, bello, inquit, capti statum non mutant, nisi ex speciali pacto. Quomodo in secundo fœdere isto inter Romanos & Carthaginienses, convenerat; ut qui à Carthaginiensibus capti, ex populis amicis Romanorum, in portus Romanis subditos venissent, in Libertatem vindicari possent, utq; Carthaginiensium amicis par jus esset. Contra Gammam & Grotium contendit Gentilis. Postliminium esse apud Amicum, qui non est hostis adversæ partis; quia Lex loquitur non solum de Socio, sed etiam de Amico; quod ratio Legis facit postliminium ubi

quis in tuto est. Non obstare quod cautum est scdere inter Romanos & Carthaginienses, quia sæpe in scderibus ex superabundanti cavetur de iis, quæ etiam de jure alias præstanda sunt.

Vid. Grotium, lib. 3. cap. 9. §. 2. *Commun Deck Lusitan.* 384. Gentil. *Advocat. Hispan.* lib. 1. c. 1, 2. *Resoldum de jure territorii*, cap. 3. nu. 4.

An res capte habenda sint, quæ à persequentibus evadere non poterunt?

TRiremes Melitenses, Piratas quasdam sequuntur, ita eos premebant, ut omnino in manus Melitenfium essent perventuri, omni spe evadendi destituti, cum ejecti in insulam Corsicam à Corsis capiuntur. Unde quaesitum fuit, an Melitenfibus essent restituendi: & consuluit Cephalus, tunc rem captam dici, quando auferre non potest quin capiat, & conclusit, Piratas Melitenfibus restituendos, aut teneri Corsos ad damna & interesse; quia fuerunt in causa, quo minus Melitenses finem ac præmium laboris consequerentur. Alciatus in feris sic censet, quæ non possunt evadere: Ludovicus vero Molina Dominium & possessionem ejus esse ait, qui actualiter capit; cum percussio alterius, non sit satis ad capiendum: Quod si percussio causa fuit ut ab alio caperetur, utique jus esse percipienti ut, pro qualitate datæ causæ, ipse aliquid, in re capta emolumenti, & juris habeat.

Vid. *Cephalum. consil.* 36. *Gentilem Advocat. Hispan.* lib. 1. cap. 4.

Utrum eorum bona, quorum oppida, aut agri ab Hostibus occupantur, depredari liceat?

Bello inter Carolum quintum Imperatorem, & Franciscum Regem Galliarum, Galli multa oppida ditionis Ducis Sabaudiarum occupaverunt; unde arrepta occasione Casariani milites, non minus subditorum Ducis Sabaudiarum bona diripiebant, quam si Regis Galliarum subditi fuissent, quia eorum hostibus favere, & iis auxilium præbere videbantur; Petrinus vero Bellus id minimè probavit: Quod Pedemontani, quamvis Gallos in eorum agris sustinerent

nerent, & iis etiam auxilia præberent, id non ultro, aut animo in Gallos quam in Cæsarianos propensiori, sed vi, & metu eorum quibus resistere nec facile, nec tutum erat, fecisse præsumendi erant: Vis vero, & metus, à dolo & culpa excusant, & à pœna aut damno immunes reddere debent.

Vid. Petr. Bellum part. 2. tit. 11. nu. 5.

An Amicorum bona in navi hostili capere liceat?

Vulgo traditur, si navis sit obnoxia, bona etiam obnoxia haberi: Grotius vero dicit, Quod dici solet, Hostiles censeris, in Hostium navibus repertas, non ita accipi oportere quasi certa sit Juris-gentium Lex, sed ut præsumptionem quandam inducat, quæ tamen validis in contrarium probationibus, elidi possit: Atque ita in Hollandia anno 1338, flagranti cum Hanseaticis bello, frequentè Senatu adjudicatum fuisse, & ex iudicato in Legem transisse.

Vid. Grotium lib. 3. cap. 6. sect. 6. Eundem plenius in annotat. ad cap. 1. lib. 3. Consulatam Maris, cap. 237.

An Amicorum naves, Inimicorum bona deferentes, præda cedant?

Cum Belgiæ mercatores, Regi Hispano adhærentes, merces in Hispaniam, in Anglorum navibus clandestinè transmitterent, Zelandiæ Incolæ, qui eos hostili odio prosequébantur, indignè ferentes, naves quasdam Anglorum id faciitantes ceperunt, & à Iudicibus Admiralitatis pro præda legitima adjudicari obtinuerunt. De quo Angli querentes, Zelandorum naves in portus Angliæ appulas, detineri procurarunt, & præfectos pro reparatione incarcerari. Principe vero Auriaco Reginam demulcente, concordatum est, ut naves & personæ captæ utrinque restituerentur. Pro sententia iudicum facere videtur. Quod navis in commissum incidit, de jure civili, in qua, sciente Domino, merces illicitæ deferuntur. Et Edictum Gallicum, quo ordinatum est, si in Socia navi, hostium merces inventæ fuerint, etiam Navem legitime acquiri.

Æquius

Equius tamen est, ut Amicorum naves, ablatis tantum mercibus, (nisi prohibitas deferant) dimittantur: & per Consulatam Maris, quo Mediterranei jus continetur, qui in amicorum navi, hostium bona deprehendit, pro eo itineris quod navis præstitit naulumolvere teneatur.

Vid. Historiam Belgicæ anno 1576. Morisotum lib. 2. cap. 10. Centilem Advocat. Hispan. lib. 1. cap. 28. Grotium in Annotat. ad cap. 1. lib. 3.

An res Amicorum ad hostes transeuntes interciperi liceat?

PAULUS Dzialinus, Sigismundi Poloniæ Regis Legatus, postquam Regina Elizabethæ literas tradidisset, more in Angliâ insolito, ad inferiorem conclavis partem, vultu ad Reginam obverso, retrocessit: Ibi alta voce, oratione Latina conqueritur, Jure gentium violato, Commercia cum Hispanis à Regina prohibita, quæsitq; inde colore, bona in fiscum esse abrepta: Proinde ablata restitui & liberam jam inde in Hispaniam navigationem permitti postulat: Sin minus, denuntiat, Polonum rationes initurum quibus suis, suorumq; subditorum rebus consulat, & eos respicere faciat, qui injuriæ authores extiterunt. Regina vero extemplo audaciam hominis his verbis repressit. Quam decepta fui! Legatum expectavi, Heraldum inveni; Non possum satis mirari tantam audaciam & temeritatem: Si tale aliquid Rex tuus tibi mandaverit, quod valde dubito, ideo factum existimo quod, juvenis cum sit, neque ordinaria sanguinis successione, sed Electione ad regnum promotus, rationes hujusmodi negotiorum non adhuc intelligat, nec ea quæ nobis cum ejus Prædecessoribus intercesserunt. Quod tu jus gentium prætendis, scire debes, exorto inter Reges bello, licere uni parti auxilia, vel subsidia ad alteram partem missa interciperi, & providere, ne damni quicquam inde sibi accidat. Hoc nos dicimus, Naturæ & gentium juri esse consentaneum; & non à nobis solum, sed etiam à Poloniæ Sueciæq; regibus facilitatum, in bellis quæ cum Muscovitis gesserunt. ita Regina. Huc spectat quod Demetrius cum Amicam teneret exercitu, Athenis famem facturus gubernatorem cum nave frumentum inferre parantem cepit; & Carthaginienſes Romanos, qui hostibus commeatum attulerunt, ceperunt;

ceperunt eosdem vero repetentibus reddiderunt. Distinguendum cenfet Grotius de rebus quæ deferuntur, quarum aliæ in bello nulum usum habent, ut quæ voluptati inserviunt, quod genus querelam non habet; aliæ in bello tantum usum habent, ut arma quæ qui hostibus subministrant, in hostium partibus habentur. Aliæ sunt quæ in bello, vel extra bellum usum habent, ut pecuniæ, commeatus, naves, quas etiam, si earum subvectio deditionem, quæ expectatur, impedire poterit, intercipere licet.

Vid. Camden. anno 1597. Grotium lib. 3. cap. 1. § 5. & in annotat. ibid. late disferentem Gentilem lib. 1. cap. 21. Eundem Advocat. Hispan. lib. 1. cap. 20

Utrum prohibita specie, ne ad hostes deferatur, materiam ex qua conficitur species, intercipere liceat?

Cum prohibitum est ne arma, aut naves ad hostes deferantur, quæritur, an si quis ferrum, ex quo arma, vel tabulas aut ligna, ex quibus naves construuntur, deferat, an incidant in commissum? Dubitari potest, quia à composito ad materiam non bene arguitur, & Statutum, vel Edictum panale non est extendendum. E contra statuitur, quod ubi est eadem ratio prohibitionis materiæ, & speciei, idem jus in utraque intelligendum, maxime ad præcavendum fraudem, unde Senatus consultum Macedonianum, quod prohibet pecuniam filio familias mutuo dari, extenditur ad res alias, ex quibus confici potest pecunia, cum contractus fraudem sapit. Item cum Prohibitio procedit secundum jus commune, utpote cum jus Civile non solum arma, sed etiam ferrum ad hostes deferri prohibeat, & Canones, qui galeas, id est triremes ad Saracenos ferri non permittunt, etiam lignamine galearum, id est ligna & tabulas ex quibus conficiuntur triremes, ne deferantur interdiciunt.

Vid. L. 2. quæ res exportari non debeant, Guidon. Decis. 371.

An cum prohibetur quid deferri ad hostes, si rei prohibita accessorium deferatur, capere liceat?

Bello inter Cæsarem, & Regem Galliarum, Duces convenerunt, ut quædam ultro, citroque transmitti possint, exceptis armis cujusque generis. Evenit ut mercator quidam partis Cæsareæ, inter merces concessas, centum, aut quinquaginta vaginas, ad recondendos enses transferret, quæ à Gallis interceptæ sunt quia vaginis etiam, ut ensibus, ad rem bellicam hostes instruuntur; Durum tamen videbatur quia lanea, & lineæ, quæ sunt necessaria ad vestimenta militum, inter merces prohibitas non censentur. Et vaginæ non sunt nisi indumenta Ensium; Mercator tamen, uti refert Petrinus Bellus, merces amisit, per Justitiam, inquit, Castrorum, quæ sæpe fit absque libris, & non raro cum levi consideratione:

Vid Petrinum Bellum de re milit. part. 9. nu. 16.

Utrum Bona prohibita, deprehensa in via ad locum hostilem, prout destinata ad Hostes, capi possint?

Navis Genueensis onusta mercibus ingentis pretii, in itinere capta fuit, quasi arma, & res prohibitas ad Turcas deferret, consuluit Rodericus Suarezius, navem & bona restitui debere, quod res ad hostes advectæ non sunt, & quia manifestis indiciis non apparuit, navem ad portum Turcarum destinatum. Juris consulti dicunt, quod Judex habet arbitrari, quod quis iturus erat ad loca prohibita, si repertus fuit in confinibus loci prohibiti, extra viam ad locum, ad quem prætendit iter propositum fuisse. Et quod in itinere captus, æquè ac si ad locum hostilem pervenisset, pœnæ obnoxium, quia interest ne bona prohibita deferantur. Nicolaus etiam Boerius, navem cum bonis prohibitis, in itinere captam pro præda legitima adjudicatam fuisse, refert; Alii distinguunt, quod aut pœna refertur ad verbum præteriti temporis, ut puta si quis portaverit, & tunc, inquit, requiritur actus consummatus, aut ad verbum præsentis temporis, ut puta si quis portet, vel repertus sit portare, & tunc sufficit quod itinere sit deprehensus.

Vid Bartol. ad L. Qui fiscales C. de Navicular. Boerium Decis 178. Bald. in 1 cum proponas, C. de nautic. favore.

Utrum

Utrum iis, quibus concessum est capere transeuntes ad hostes, capere liceat ab hostibus redeuntes?

Constitutione Hispanica, si Clerici deprehendantur ferentes arma, possunt per Iudices seculares armis spoliari. At si vero eos gessisse constiterit, ab iis Iudicibus secuti sunt. Videtur tamen accessione, & regressum, eodem jure censer. Alii distinguunt, ab Intentione, & fine statuentis. Nimirum, si concessa fuit potestas capiendi, ut præmio afficiantur, qui impediunt transvectionem bonorum prohibitorum; iis duntaxat prædam deberi, qui capiunt antequam ad hostes deferantur; si vero ut alii damno deterreantur, ne transvehant, Etiam bona eorum qui detulerunt, redeuntium capi posse.

Vid DD. ad l. si fugitivi C. de serv. fugis. Apostilla Bartol: ad l. 3. Neratius D. acquir. possess.

Utrum Herbam Nicotianam; vulgo Tobacco, ad hostes transferre liceat?

Tempore belli inter Hispaniarum Regem, & Ordines confœderatarum provinciarum Belgicæ, quidam mercatores Angli navem onustam herba Nicotiana, vulgo Tobacco, ad portum Ordinum confœderatarum provinciarum destinarunt; Eandem navem cum bonis, subditi Regis Hispaniarum, quasi bona ad hostes transferri prohibita deferentem, interceperunt. Angli mercatores in tribunali maritimo Regis Hispaniæ restitutionem navis, & bonorum petunt, Ibi subditi Regis Hispaniæ contendunt Herbam Nicotianam inter victualia censendam, saltem ejus usu victualium consumptionem protrahi, & eadem ratione confiscandam, qua Sal, quo victualia à putredine servantur. Pro Anglis proferebantur Medicorum testimonia, quibus fumum herbe Nicotianæ non nutrire confirmabatur & Juris consultorum Opiniones, qui asserabant utrunque subditorum bona, à paritate rationis in Commissum incidant, Exterorum tamen, & Amicorum, nisi verbis expressis interdicta sint, Confiscationi non esse obnoxia. Pro subdito regis

Hispaniæ, in ipsius tribunali maritimo sententia lata est, de qua Angli ad Regem suum conqueruntur, qui habita causæ examinatione & Consultis in jure Peritis, Mercatoribus Anglis contra subditos Regis Hispaniæ, ad recuperandum & resarciendum damna quæ passi sunt, Literas Repræfaliarum concessit.

Vid. Commiss. & Process. in Curia Admiral. Angliæ.

Utrum licitum propter illicitum incidat in commissum?

Refert Petrinus Bellus mercatorem, qui cum aliis mercibus vaginalium ensium deferebat, non solum ensium vaginalium, sed aliis etiam mercibus, quas sexcentis scutis redemit, multatum fuisse, eo prætextu, quod licitum propter illicitum incidat in commissum. Paulus Jureconsultus ait, Si quid illicitè navi, præsentè Domino, imponatur, non solum merces, sed etiam navem fisco vindicandam. Alii distinguunt, an res licitæ & illicitæ quæ una vehuntur, sint ejusdem Domini, an diversorum; & aiunt priore casu omnes confiscari, posteriore res duntaxat eorum qui rerum illicitarum Domini fuerant.

Vid. L. Cotem D. de publican. & ibi DD. Cynum in licum propositas, C. de navio, senere.

Utrum quòd Navis, Principis alterius navi bellica vela non submittant, Navis pro præda capi possit?

Gallus Præfectus navis bellicæ, navi Hamburgensi ex Hispania redeunti occurrens, nautis vela submittere imperavit, quod cum ipsi facere detrectarent, vi aggressus subegit, & navem in Galliam deducens, prædam legitime captam, sibi & Sociis adjudicandam contendit: Quòd ad Principis dignitatem spectat, aliarum gentium naves, navibus ipsius insignia gestantibus, debitam reverentiam exhibere. Quòd Edictis Regis sancitum sit, quod sub capturæ periculo, aliæ naves regiiis navibus submittant vela. Pro Hamburgensibus responsum, In partibus Hispaniæ, ubi nullum jus Imperii Gallus vindicat, reverentiam ejus navibus non deberi.

Edicta

Edicta Gallica extraneos non astringere, præcipuè ignorantes. Hamburgenses, prout Gallo, ita Hispano fœderatos, & in Hispania, iis licere commercium liberè exercere. Ludovicus Servinus, Advocatus regius, refert à Judice inferioris tribunalis, navem legitimè captam, à Judicibus verò tribunalis superioris, qui cum exteris & amicis, non ex rigore agendum censuerunt, navem restituendam pronuntiatum esse.

Vid. Servinum. tom. 2. tit. 11. Io. Seldenum Maris classis, lib. 2. cap. 16.

Utrum Res à Piratis recuperata prioribus Dominis sint restituenda?

Constat capta à Latronibus, & Piratis nunquam in eorum Dominium transire; Expresè Javolenus, servum ait surreptum à Latronibus, quamvis postea in manus hostium venerit, & iis bello victis, à victoribus venditus fuerit, ab emptore usucapi non posse. Ayala tamen in eam opinionem inclinat: Quòd res, quæ per illegitimos hostes erepta, postea in potestatem eorum, qui iusti hostes sunt, pervenerit; deinde à Civibus virtute bellica recuperata, vel commercio redempta est, priori Domino non sit restituenda. Responsum Javoleni in servo admittit, propter jus postliminii, non in rebus aliis, quæ postliminio carent. Gentilis contrarium defendit, nec distinctionem inter servos, & res alias probat, cum ratio Legis in omnibus concludat; quæ surreptæ sunt; & res aliæ (quibusdam exceptis, quæ non sine flagitio amittuntur) æquè ac servi postliminium habeant: cum Gentili consentit Grotius, qui affirmat, jus gentium non concedere, ut Latrones vel Piratæ dominium mutant: Unde Athenienses Halonesam, quam ipsis Prædones, Prædonibus Philippus eripuerat, ut redditam à Philippo, non donatam volebant accipere; Censet tamen naturali juri convenire, ut ei qui suo sumptu rem redemit, tantum reddatur, quantum Dominus ipse ad rem recuperandam liberè impensurus erat.

Vid. Ayalam, lib. 1. tit. 5. nu. 40. Gentilem Advocat. Hispanic. lib. 1. c. 12. Et 15. Grotium, lib. 3. cap. 9. nu. 16.

Utrum

Utrum in Direptione urbi, ei qui primus domum invasi, an ei qui postea in domo latentem cepit, redemptionis pretium debeat?

Cum Civitas quædam, uti refert Petrinus Bellus, diriperetur, quidam signifer cum militibus ingressus est monasterium, illudque secundum militarem licentiam expilavit: Erat autem intra illud monasterium nobilis quidam in cubiculo secreto absconditus, qui indicio ejus famuli, in manus alterius Capitaneus, qui postea intravit monasterium, devenit, priusquam à signifero deprehenderetur; quærebatur, uter eorum, ad pretium redemptionis, potius jus haberet. Pro signifero contendebatur, quod cum primus invasisset monasterium, quicquid in eo continebatur, ad ipsum pertinebat, cum possessor continentis, etiam possessor contentorum habeatur: quod secundum consuetudinem militarem, qui domum occupavit omnia in domo occupasse intelligitur. Pro parte contraria arguebatur, Quod quæ neque corpore, neque oculis comprehenduntur, animo acquiri nequeunt: Et ex Jurisconsultorum sententia, qui fundum possidet, thesaurum, quem in fundo positum nescit, nequaquam possideat: Et quoad Consuetudinem militarem, non eandem esse rationem domus privatae & monasterii, propter diversas & multiplices habitationes, quæ eorum ambitu continentur; pro jure Capitanei pronuntiatum refert Petrinus Bellus.

Vid. Petrin. Bellum, part. 4. tit. 8. nu. 15. L. Neratius. L. Quædammodum. D. de acquir. possess. Gentilem, lib. 2. cap. 16. Alciat. 5. consil. 41.

An qui militi equum præbuit, prada ab eo capta particeps esse debeat?

Præfectus turmae Equitum Hispanorum, cum prælio tuba caneret, unum ex Equitibus suæ turmae obvium habuit; qui questus est, quod paucis ante diebus, equum suum in certamine amiserat, propter quod non poterat imminenti prælio interesse; unde jussit Præfectus, ut unum ex suis equis conscenderet, & ipsum comitaretur; Miles equo conscenso inter fugandum hostes, incidit in ipsum Ducem hostilis exercitus, quem cepit & consignavit Duci exercitus

exercitus Hispani, qui à captivo vicena aureorum millia est consequutus : Dicebat Præfectus partem pretii hujus redemptionis sibi deberi, quod miles equo suo dimicaverat, qui aliàs prælio interesse non potuit : Pétrinus Bellus affirmat se, cum esset Bruxellis in curia Hispaniarum Regis de hac quæstione consultum, & censuisse, pro Præfecto facere æquitatem, quæ præcipuè respicitur inter milites, quorum controversiæ ex æquo & bono dirimendæ sunt; unde ultra conventa quis obligatur ad id, quod alterum alteri præstare oportet: Præfectum etiam proposuisse consuetudinem Castrorum, ut qui equum commodat, admittatur in partem lucri, ait vero, se cum à Curia recederet, hanc litem indecisam reliquisse; postea autem audivisse fuisse pronuntiatum contra Præfectum, jure, an injuria non definit.

Vid. Petr. Bellum, part. 4. tit. 8. nu. 8.

Si captus in prælio denuò capiatur, cuinam Redemptionis pretium debeatur?

IN Prælio inter cohortes Caroli quinti Imperatoris, & Francisci Regis Galliarum, Gallus nobilis in potestatem militis Cæsariani reductus est, qui in signum deditionis ensẽ tradidit, & promissit non aufugere, remansit tamen in suo equo cum clava; inciditque paulo postea in alium Cæsarianum Equitem, qui clava ei abrepta, & dimissis de equi cervicibus habenis, ipsum captivum abduxit: supervenientibus vero Gallis, Cæsarianorum turma fugam fecit, & Equus effrænis sua sponte Cæsarianos fugientes insequutus est, donec perventum est ad Pedites Cæsarianos, qui fugam suorum compresserunt, hostes repulerunt, captivumque illum, quem equus ducebat, ceperunt; unde quærebatur, cujus captivus verè haberetur, an primi cui fidem & ensẽ dederat; an secundi, qui clavam ei eripuerat, & in frænum in equo fecerat; an Peditis qui tertio ipsum vagantem ceperat; dicebat Petrinus Bellus pro peditẽ pronuntiandum; quia quod ad eos attinebat, qui ipsum primo & secundo loco ceperant, Gallis irruentibus, & Cæsarianis in fugam versis, captivus pristinae libertati restitutus videbatur. Baldus in casu prope consimili distinguit, an primus capiens, captivum actu retinuerit;

retinuerit; an suæ fidei commiserit, & dicit, quod si retinuit vel abduxit aliquo tempore, est verè & in solidum captivus primi capientis: Si vero non retinuit, nec abduxit, sed sub fide relaxavit; ejus verba & promissionem non obstare, quo minus per alium capiatur. Petrino vero Bello indistinctè concludendum videtur, siue manu ductum, siue suæ fidei commissum, non posse per alium capi; Quia is quem fides obstringit, non minus capientis custodia coeretur, quam si manibus aut vinculis teneretur: Hæc vero obtinent inter milites ejusdem partis, & cum præsumitur primo capientem possessionem animo retinere: Recuperatus vero à suis, id est, à parte capienti adversa, vel pro derelicto habitus, quod præsumendum est ab iis qui fugiunt, quo minus ab alio denuo capiatur non impediunt.

Vid. Petr. Bellum, part. 4. tit. 7. nu. 11. Baldum in 4. Adoptionem. C. de Adoptio.

An Princeps à milite privato captus ab eo detineri possit?

Cum Edvardo tertio Rege Angliæ Calesiam obsidente David Rex Scotiæ cum numerofo exercitu Angliam invasisset, Regiæ auspiciis exercitus collectus, cum iis congressus Scotos penitus fudit; Rexq; eorum à Johanne Coplando armigero captus ad castrum cui ipse præfuit abductus est; quod cum Regina rescivit, literis ad ipsum datis imperavit, Regem captivum ad se adducere: Quibus Coplandus respondit, se nemini, nec viro, nec mulieri, præterquam Regi, Regem captivum cessurum. Itaq; Regina Literis ad Regem missis, de contumacia Coplandi quæstæ est: Rexq; eum ad se Calesiam obsidentem accersivit, qui cum comparuisset, factumq; excusasset, Rex ipsi condonavit, & terras ad valorem quingentarum librarum ipsi, ejusq; posteris concessit; Sed tamen Regem captivum in manus Regiæ tradere mandavit; quod Coplandus in Angliam reversus, Regiæ etiam indignationem deprecatus, serîo & humiliter præstitit.

Vid. Froffard, historia, lib. 1.

An

An Civitas bello capta amittat jura?

Cum Alexander Thebas evertisset, invenit tabulas, quibus continebatur, eos centum talenta Theſſalis mutuo dedisse: Has, quia Theſſalorum commilitio usus fuisset, iis ultro donavit. Alexander, postea Thebani à Cassandro restituti reposcunt Theſſalos, apud Amphictionas agunt. Hotomannus pro Thebanis arguit, quod Alexander non universalis & juris successor, sed particularis, & rerum particularium fuerit; Quia victores earum rerum Domini fiunt quæ manu capiuntur: Item quod Thebani jure postliminii jus suum pristinum recuperassent, Gentilis vero pro Theſſalis defendit, quod Alexander Thebanorum universalis successor habendus fuerit, cum eversa sint Thebæ, & quasi mortem passæ essent, quod & ante censuit Ærodius, qui omnia Hotomanni argumenta recenset, & Amphictionas pro Theſſalis judicasse arbitrat.

Vid. Horoman. illust. quæst. 5. Gentilem, lib. 3. cap. 5. Ærodius lib. 1. tit. 9. Ayalam, lib. 1. cap. 5. nu. 41. Grotium, lib. 3. cap. 18. § 4.

Utrum Ferdinandus Rex Hispania, regnum Navarra pulso Johanne Albretano rege, juste occupaverit?

Cum Ludovicus duodecimus, Gallia Rex, contra Civitates Pontificias in Italia bellum moveret; Julius secundus Pontifex Ferdinandum Regem Hispania, & Henricum octavum Anglia, (ad quem jus ad Ducatum Aquitania pertinebat) ut contra Gallum, bellum moverent, excitavit: Quorum copia ut convenirent, Regi Hispano opportunum visum est, per Navarram exercitum ducere, idque à Johanne Albretano Rege, missis Legatis petiit, & cum non impetraret, regnum invasit, & Rege à copiis, & auxiliis imparato, cum conjuge & Liberis Benearnum, cis Pirenæum se recipiente, occupavit: Ferdinandum Regnum Navarrae juste occupasse defenditur, quia transitus per regnum, qui de jure gentium debebatur, negatus esset: Ob ejusmodi causam Mosen Amorrhæorum, Judam Ephronitarum, Civitates evertisse: Insuper Johannem Navarrae Regem, quod in Galli, Ecclesiae Romanae hostis, partes

propensior esset, à Pontifice excommunicatum; & regno, quod in Hispanum translatum, exutum fuisse. Pro Johanne Albretano asseritur, ipsum regis Galliarum fiduciarum fuisse, & multum patrimonii; quod si Hispano faveret, amissurus erat, ultra montes Pireneos in Gallia habuisse: Hispanum non solum transitum, exercitui permitti; sed, ut exercitui consuleretur, arces, & loca munita, quæ armatis sine periculo concedi non potuerunt, flagitasse. Pontificis Romani censuram, non minus quod sine causa injustam, quam translationem regni, sine auctoritate ineptam fuisse. Quemadmodum, cum Alexander sextus Pontifex Indiam Occidentalem Hispano donasset: Attabaliba, Rex Peruanus dixit, eum insigniter factum & impudentem esse qui, aliena tam liberaliter largiretur.

Vid. pro Hispano Antonium Nebriſſenſem de bello Navarrienſi. Iohannem Lopi-um de obitu regni Navarre. Antonium de Padilla ad L. Per Agrum. C. de Servitut. Et aqua. Contra Hispanum Carcl. Molinæum ad Conſuetud. Pariſienſis. §. 41. Repute aage, nu. 8. Bodinum, lib. 1. cap. 9. nu. 120. Benç. Hiſtor. novi Orbis, l. 3, cap. 3.

Utrum Philippus secundus, Rex Castella, Antonium Regem regno Portugallia, iuste ejecerit?

Emanuel Rex Portugalliarum filios habuit, Johannem, Henricum, Ludovicum, Edvardum & Elizabetham filiam, Johannes successit Emanueli; cujus stirpe deficiente, regnum Henrico Cardinali delatum est; qui cum senex esset, & otibus, de successione publicum iudicium instituit, in quo camparuerunt. Antonius Ludovici filius, sed habitus illegitimus; Rainutius Farnesius Dux Parmensis, ex Maria Edvardi filia nepos, Catharina Ducissa Bragantiarum, ejusdem Edvardi filia, & Philippus Rex Castellæ Elizabethæ filius. Quæstione habita de natalibus Antonii, sententia lata est contra Antonium, quæ spurium pronuntiatur. Henricus priusquam aliquid de successione decrevisset decessit; Populusq; Antonium, Ludovici filium Regem elegit, & coronari fecit, quem postea Philippus secundus misso exercitu, sub Albano Duce, fugavit, & Portugalliam totam sub potestate redegit. Pro Antonio diserebatur, Sententiam ab Henrico latam, quæ spurium pronuntiatus est, à Pontifice Romano improbatam fuisse; Ludovicum patrem ejus cum matre

matre matrimonium, etsi clandestinum, & ex causis aliquot dissimulatum, legitimum tamen contraxisse; & ita habitum, impedimento fuisse ne Henricus octavus Rex Angliæ, filiam Mariam Ludovico desponsaret: Sin minus legitime natus fuisset, quāplures filios naturales, non solum in Portugallia, sed in Castella & aliis regnis, patribus successisse. Præterea si in Cognatione regia, Linea masculina deficeret, Populus Lusitanus jus eligendi regem ad se devolutum contendebat. Pro Philippo arguebatur, quod satis exploratum fuit. Antonium illegitime natum fuisse, quod Henrici sententia Pontifici displicuit, quia ipsius autoritate posthabita, Rex in causa matrimonii iudicasset: Quod præsumptum jus Antonii ab aliis omnibus cognatis improbaretur; Quod Populo eligendi Regem, aliquibus ex regio sanguine existentibus, nequaquam competeret: Quod priusquam regnum invasit, Jurisconsultos & Theologos consuluit, & per Deum & fidem obtestatus est, ut de ejus jure quid statuendum, veraciter edicerent, & ex eorum consilio jus suum ad regnum asseruisset.

Vid. Cambden. Eliz. anno 1582. pro Antonio. Declaration du succession sur le royaume de Portugal impress. Aelweisp. 1582. cap. 2. Discours du Roy Don Antonio a Paris. 1607. Pro Philippo, Hieron. Conestragium de Portugallia & Castelle conjunctione. Antonium Viperanum de Obtentu portugallie.

Utrum Lusitanæ regnum Portugallie, à Philippo quarto Rege Hispania, ad Johannem Ducem Bragantie justè transfunderint.

IN Iudicio quod de Successione in regno Portugallie Henricus Rex instituit, Rainutius Farnesius Dux Parmensis, ex Maria, Edvardi fratris Henrici filia seniore, natus contendebat, secundum jus purum, & simplex, Reges quot filios, tot primogenituras relinquere, primâ finitâ secundam, & secundâ finitâ tertiam, & sic deinceps succedere, & proinde Johannis, Henrici & Ludovici lineis deficientibus se ex Maria, Edvardi filia natu majori, ad successionem præ reliquis admittendum. Pro Catharina Ducissa Bragantæ, immediatè Edvardi filia arguebatur, Patrem Edvardum si tempore mortis Henrici in vivis fuisset, indubitatum futurum regni hæredem, Edvardo defuncto ipsi ejus filia superstiti idem jus competere, eam Rainutio gradu proximiorē, & Philippo sororis filio,

cum ipsa esset fratris filia, præferendam. Pro Philippo Castellæ rege, Isabellæ Emanuelis filia, & Caroli quinti Imperatoris filio, assererebatur; Rainutium Edvardi nepotem, & Catharinam ejusdem filiam, beneficio juris Representationis niti, quod nihil aliud erat, quam fictio juris civilis, nec ad regnorum successiones pertinebat, ipsum Rainutio gradus proximitate, Catharina sexus nobilitate, utrisq; ætatis prærogativa potiore. A Philippo quarto (Philippi secundi qui armis regno potitus est nepote) Lusitani regiminis Castellani pertæsi, desciscetes Johannem Bragantiæ Ducem, Theodosii filium, & Catharinæ nepotem ad regnum promoverunt: Castellani id ut injuste, & nequiter factum incusant: Quod non solum jure sanguinis, sed & justæ victoriæ, Philippus secundus regnum adeptus sit. Quod Lusitani universi ejus & hæredum imperio parere jurejurandis devincti erant. Quod Dux Bragantiæ pro Ducatu, Regi præsentī fidelitatem debuit, & summæ ingratitude reus sit, quod militari in regno potentia contra Regem abusus est; Lusitani contra defendunt: Quod Philippus secundus, nullo sanguinis jure regnum obtinuit, cum Leges Fundamentales regni, Extraneos in regno succedere non permittant; Quod regnum armis subjugatum, armis se in libertatem vindicare posset. Quod possessor malæ fidei nullo tempore, nedum sexaginta annis præscribere possit. Quod Reges Castellani à Lusitanis juramentorum, quibus obedientiam promiserunt, observationem expectare non debuerint, cum ab ipsis, quæ tempore inaugurationis jurati promiserunt, non observarentur, nimirum cum Margareta Ducissa Mantuæ gubernatrix regni constitueretur, quæ etiam si erat regii sanguinis, tamen non erat, intra designatos gradus: Cum negotia ad regnum Portugalliæ pertinentia, non consilio Lusitanorum in Hispania, prout debuerunt, sed arbitrio Castellanorum expedirentur: Cum in consilio Lusitiæ supremo, nec non in Consiliis Patrimonii Regii, Castellani adhiberentur. Ad Ducē Bragantiæ quod attinet, Fidelitatis Regi promissionem juri proprio non derogasse, nec favoris Regii causā, officium erga patriam omittere debuisse; Cum multis aliis, quæ ab autore Lusitiæ liberatæ, recensentur.

Vid Pro Rainutio Consilium Iuriconsult. Pasavin. Pro Catharina Bononiensi. et Perusini. Pro Philippo Michazlem ab Aguyre Pro Lusitanis, Antonii de Souza, Lusitaniam liberatam, et autores utriusq; ab eorundem.

Vtrum

Utrum Ferdinandus à Bohemicis abdicatus, regnum armis iuste occupavit ?

Ferdinandus Caroli Archiducis Austriae filius, Matthiae Imperatoris consanguineus Pragae in Comitibus Ordinum, mense Junii 1617, successor in regno Bohemiae designatus est, & mense Julii coronatus. Postea Matthia, mense Martii insequente defuncto, Ordines Ferdinandum abdicant, & Fredericum quintum Electorem Palatinum, in Regem elegerunt. Bohemiae Ordines eum iuste abdicatum asserunt. Quod ipsis jus Electionis liberae competat, quod exemplis ab anno Christi 345. usque ad tempus Matthiae Imperatoris ostendunt. Ferdinandi designationem, conditionatam fuisse, scilicet: ea lege (quod scripto cavit) ne vivo Matthia regimen usurparet, & ne, (prout juramento se astrinxit) quicquam contra libertates, & privilegia illius regni attentaret. Ferdinandum vero Matthia vivente, regni negotiis se immiscuisse, Religionem Evangelicam exterminare molitum esse, Externos milites ad opprimendum incolas induxisse, & in praedictum perpetuum liberae electionis, cum Hispano Rege, Religionis Pontificiae assertore acerrimo pactum de transferendo regno iniisse. Pro Ferdinando contenditur, Jus Electionis quod habent Bohemi, ad familias Archiducum, & Regum semper fuisse astrictum, usque successionis, quam Electionis, in eo regno potius, semper habitum fuisse, Illum legitime electum, nec quicquam, cur abdicaretur, admisisse, Quod vivente Matthia, nihil nisi ex ejus mandato, ad sedandos tumultus fecerit, quod nihil ex causa Religionis, contra Professores Augustanae confessionis, (qui soli in Germania tolerati sunt) suscepit. Quod Bohemi primo contra Matthiam Imperatorem arma sumpserint, eoque languente castrum Pragae, cum sceptro & Corona Bohemica occupaverint, Directores ad gubernandum regnum constituerint, Quod pactum cum Hispano de successione in regno, cum consensu Imperatoris Matthiae, & fratrum suorum (quorum interfuit) pro bono publico, ad evitandum scilicet bellum, cum potentissimo Principe, de Domo Austriaca, jus ad successionem praetendente initum fuerit.

Vid. Pro parte Ferdinandi, Jus haereditarium austriacum, Goldastum de Bohemiae regni juriibus Liturae pro utroque nonnunquam.

Contra informationem Cancellariae bohemicae. Anima d'ersionem in Lituram, cum Iudicio Bohemicae, & informatione Gallicae Catholicorum, & Notorium Imperatoris Ferdinandi, & Frederici 5. Electoris Evidentiam causa Bohemicae

Utrum Ferdinandus Imperator, Fredericum Palatinum, & liberos Electoratu, & ditionibus iuste eiecerit?

Ferdinandus secundus Imperator, Fredericum quintum Comitem Palatinum, quod Bohemiæ regimen in se suscepisset, criminis læsæ Majestatis condemnavit, Palatinatu, & Electoratu exuit, ejusque dignitates & ditiones in Bavariæ Duces transtulit. Quæsitum est. 1. An Imperator, sine consensu Principum Imperii, ipsum proscribere potuit. 2. An iuste liberos una cum patre Dignitatibus, & Ditionibus privaverit. Qui partes Imperatoris sustinent, iuste eum fecisse asserunt. Quod si quis Ferdinando Bohemiæ Regi injuriam inferat, eandem idem Ferdinandus Imperator coercere possit, cum qui duas personas sustinet, utriusque jure, & privilegiis uti non prohibeatur. Quod in causa manifesta, & notoria, Consilium Ordinum, aut Principum adhibere necesse non fuerit, Quod Electores alii, saltem major pars eorum, prescriptionem ratam habuerint. 2.º Quod ob crimen læsæ Majestatis non solum jure Civili, (prout Arcadius & Honorius statuerunt) liberi hæreditate, & successione paterna spoliantur, sed aliarum gentium consuetudine, (Italiæ scil. Galliæ, Hispaniæ, Angliæ) ob crimen à Patre commissum, Posteriores amittant feuda, cum tacitum pactum traditioni feudi intervenire censeatur, quo Dominus jus Commissi stipuletur, non modo ab ipso Donatario, sed etiam ab omnibus eidem substitutis, casu quo facinus Commissorium perpetratum fuerit. Qui Comites Palatini partes agunt, aliter arguunt. Nullo jure licere, in propria causa Judicem agere, Constitutionibus & Capitulationibus Regum Romanorum, immo ipsius Ferdinandi, Imperatorem astrictum, in gravioribus causis, Ordinum, aut Electorum consilium adhibere, Principes Imperii, ex privilegio, in causis quæ earum Ditiones, aut Dignitates concernunt, nullius præterquam Patrium iudicio subjici. Electores, qui Proscriptioni assensum postea præbuerunt, non collegialiter congregatos, sed seorsim singulos suffragia exhibuisse, Sententiam, ipso jure nullam, confirmari non potuisse. Quod ad Frederici liberos spectat. Alphenum Jurisconsultum, respondisse, Eum qui Civitatem amiserat, nihil aliud juris, liberis adimere, nisi quod ab ipso ad eos perventurum sit, Quæ vero
non

non à Patre, sed à Natura, à Civitate, à Genere tribuuntur, ea manere iis incolumia, Germanica feuda, à feudis aliorum regnorum discrepare, quippe in Italia, Gallia, Hispania, fenda esse in patrimonio, ea qui possident, alienare, amittere, & à posteris avertere posse. In Germania feuda, præcipuè Dignitatum illustrium, ex Provisione Legis fundamentalis, & Consuetudinis perpetuæ observantia, ita ad liberos, & Agnatos pertinere, ut Prædecessores, nullo facto, jus iis competens, auferre, aut transferre possint, Cum virtute primæ concessionis, & investituræ, non hereditatis paternæ, deferantur, Et Generis, non Patris sint Beneficia, & possidentes pro vita tantum, jus habeant. Itaque nec crimine læsæ Majestatis confiscantur, nec bello justo in præjudicium liberorum amittuntur. Quod pro liberis Marchionis Montiferrati de Castris quibusdam feudalibus à Duce Bavariz captis, & à Patre eorum, Pacis causa dimissis, judicatum perhibetur. Prout & reliqua, Clarissimorum Jurisconsultorum auctoritatibus, & sententiis consentanea asseruntur.

Vid. Pro Imperatore Bannum Imperiale, Iustitiam Imperialem. Pro Palatina Nulitati Libellum. Speculum Banni, Catholicon, & Notorum parte 3. Indicias Causæ Palatinæ auctore Iohanne, Loncino à Rudorf.

Virum Rex Suecia, cum Exercitu, Germaniam justè invaserit?

Cum Ferdinandus secundus Imperator, Ferdinandum filium Hungariæ, Bohemiæque regem coronari obtinisset, Principes Germaniæ, præsertim Electores, (uti Baptista Burgus refert) eundem etiam ad regnum Romanorum promoturum, suspicabantur, & proinde ne Austriaci hereditariam successionem ad Imperium præscriberent, Hispani plus æquo rebus Germanicis se immiscerent, Reformatæ Religionis Professores, prout ex Austria, & Bohemia, ita etiam ex Germaniæ ditionibus pellerentur, consilium, injerunt armis, & vi armata, Libertates, & privilegia Imperii vindicare, & Religioni suæ consulere, Cumque de Germano Duce minime convenire possent, quod nemo ex Germanis alteri cedat, nec pro præsentis Cæsaris potentiâ, delectus militum in Germaniâ sine periculo haberi posset, consultius duxerunt Principem aliquem externum, Germanis gradu, & dignitate eminentiorem, militiæ præficere

præficere, præcipuè Sueciæ Regem, Reformatæ Religionis assertorem, bello innutritum, invictum, cuiq; cum Cæsare Simultates intercederant; Eidem igitur arma, pecuniam, & omnia necessaria pollicentes, Regem in eorum partes pellexerunt, ut alieno periculo, propriâ gloriâ in Germania bellum faceret. Gustavus vero rex Sueciæ, ut justæ causæ profectionis suæ innotescerent, Libellum Latino, & Germanico sermone, edidit, in quo refert injurias, sibi, & confederatis suis, à Cæsarianis illatas; Se quod Stralsfundam obsidione liberasset, indigne tractatum, & Hostibus suppetias à Cæsare missas Pro injuriis refert, 1°. Quod Cæsariani suas ad Transilvaniæ Principem literas interceperant; Tabellario in carcerem coniecto, easq; conficta verborum interpretatione, in ejus invidiam publicaverant. 2°. Quod cum inter Regem, & Polonos pax tractaretur, nihil omiserint, ut pacem interturbarent, Polonis ultro subsidia offerentes, concedenteq; ut milites in Germania conscriberent, & arma contraherent: Germanis vero, ne Regi militarent, interdicerent. 3°. Quod subditos suos Commercii causa, ad Germanica littora appellentes, ablati mercibus, & confiscatis navibus, spoliaverant. 4°. Quod expulsis Megapoleos Ducibus, omnia totius Megapoleos, & Pomeraniæ loca, tam maritima, quam mediterranea, muniverant. 5°. Quod classem ad Balticum mare infestandam instruxerant, & Vollestanus Fridlandiæ Dux pro Admirallo, vel Generali maritimo, in præjudicium sui juris constitutus esset. Ad Stralsfundam Urbem quod attinet; Cum, quod Exercitum Cæsaris, qui adjacentes regiones hostiliter vastaverant, recipere recusasset, donec mandatum à Cæsare haberetur, arcta obsidione premeretur, & posthabito præsidio Regis Daniæ, quod is tum temporis hostis Imperii habebatur, Regis Sueciæ auxilium imploravit; Is coactis militibus urbem obsidione, & excidio, quod ei Exercitus Vollestanti minabatur, liberavit; Eamq; salvam & integram Cæsari conservavit: Cumq; tractatum Pacis inter Imperatorem & Regem Daniæ Lubecæ instituendum intelligeret, suos Legatos eo mittendos censuit, qui Stralsfundensis Urbis causam accomodarent, quos Rex Daniæ grate admisit; Legati vero Cæsaris, magna cum indignitate repulerunt; nec tantum urbe Lubeca, sed toto etiam solo Germanico, sub extremi periculi, interminatione facessere jusserunt. De Supetius Hosti ministratis,
Quod

Quod Dux Holsatix cum Exercitu, sub ipsius Cæsaris signis, Polonis subsidio, contra Regem missus esset; Quodq; postea, Exercitus in Borussiam, sub Cæsaris Campi Marefchallo duceretur. De his à Rege Sueciæ ad Electores Imperii, priusquam ejus milites in Germaniam irruerunt, Literæ datæ; Quibus post quatuor menses, responsum ab Electoribus. Se, quod Amicitia, quæ Regiæ dignitati, cum Romano Imperio, à Pacis Oforibus violata esset, non probare, nec credere Cæsarem; Exercitum in maris Baltici fines, ad præjudicium Regis mandasse; sed, ut eorum conatus, qui hostium partes foverent, reprimeret; Stralsfundanos, si opere magis quam verbis, erga Cæsarem obsequentes fuissent, promptiora remedia contra militum injurias, ab ejus Clementia, quam ab externis auxiliis reperire potuissent. Cæsarem, Regem Poloniæ amicum, & consanguineum deferere non decuisse, nec rem tanti momenti fuisse, ut propterea novi motus in Imperio concitarentur, cum rationes pacis conciliandæ non deessent, & proinde rogant, ut arma quamprimum deponat. Quibus Rex aliis literis significavit, Gratum sibi, quod injurias à Pacis perturbatoribus illatas non probent, multo gratius fuisse, si rationes quibus arcerentur, proposuissent; Se de Cæsare nihil suspicari, de irruptione militum in fines maris Baltici, sed postquam tot atroces injurias, à Pacis perturbatoribus passus esset, se eos suspectos merito habuisse; Stralsfundanos paratos causam suam coram æquis arbitris agere, de qua minus est quod dubitent, cum contra Cæsaris Decreta se oppressos exploratum habeant: Amicitiam, & Cognationem, quæ Cæsari cum Rege Poloniæ intercedit, non posse se obligare, ut hostilem impressionem ferat, aut dissimulet; Se denique Exercitum, ex Imperii finibus deducturum, cum de injuriis sibi illatis satisfactum fuerit.

Vid. Petri Baptistæ Burgi Comment. de bello Suecico. Philippi Arlanibai Armæ Suecicæ, Deduction. causarum. Regi Sueciæ literas ad Electores, p. 4. & 5. Electorum ad Regem, p. 36. Regi danico ad Electores, p. 49.

S E C T. IX.

De Quæstionibus Debiti inter eos
quibuscum Bellum est.

Quæstiones de Debito inter eos quibuscum bellum est, sunt, in quibus queritur de Jure Congressus, Legationis, Conventionis, & Fæderis militaris.

Utrum singulari certamine controversias inter Principes derimere liceat?

Duellum vetitum esse Civili, & Canonico jure, receptum est: Philosophi vero & Jurisconsulti, aliquando probant, & valde laudabile, esse aiunt ex causa ut majus malum evitetur; Strabo vetustam fuisse Græcorum consuetudinem tradit, singulari certamine controversias derimere, & apud Virgilium *Æneas* æquum fuisse ait, ut inter se & Turnum eodem modo *Lis* decideretur; Sic apud Livium. Metius Tullum alloquitur, *Ineamus* aliquam viam, qua utri utriusq; imperent, sine multo sanguine utriusq; populi decerni possit.

Vide, Alciatum de singulari certamine. Petrin. Bellum, part. 2. tit. 15. Gentilem, lib. 3. cap. 15. Grotium, lib. 2. cap. 23. §. 10. Lib. 3. cap. 20. §. 43.

An Rex in possessione Regni ab eo qui jus ad regnum pretendit provocari possit?

Cum Renatus Dux Andegavenſis Alphonſo Sicilia Regi Chirothecam ſanguinolentam, provocandi cauſa miſiſſet, ut de jure Regni Duello concertarent: Aliis iniqua conditio videbatur, quod Alphonſus corona inſignitus eſſet, & regnum poſſidebat; Renatus titulo tenus jus ad regium decus pretendebat: Alii tamen juſtam denuntiationem exiſtimabant, cum corona dignitatem non augeat, & poſſeſſio per Alphonſum apprehenſa, jus Domini,

Dominii, quod Renatus ad se pertinere contendebat, deterius non redderet.

Vid. Alciatum de singulari certamine, cap. 30.

An Dux Exercitus ab hoste provocatus, duellum cum honore declinare possit ?

Cum Comes Hartfordiæ summo cum imperio in Scotiam exercitum Anglorum duxisset, & propediem cum Scotorum Duce & exercitu dimicaturus esset, missus est a Gubernatore Scotiæ, Facialis ad proponendum conditiones pacis, & Comitjs Huntlaei nomine Tubicen qui Hartfordiæ Comiti denuntiaret, si propositi pacis conditiones non placerent, ad evitandum profusionem sanguinis plurimum Christianorum, Comitem Huntlaeum paratum, duello cum Hartfordiæ Comite, si is annueret, de præsentis controversia concertare: Hartfordiæ vero Comes cum pacis conditiones ut minus honestas respuisset, Tubicini respondit; Quod si Lis inter ipsum & Comitem Huntlaeum fuisset, se oblatam Duelli conditionem, recusaturum non fuisse, sed cum controversia esset regni Angliæ, cum regno Scotiæ, non esse in ejus potestate tanti negotii discrimen, proprio periculo subicere, nedum cum publicam Ducis exercitus personam sustineret, convenire, in certamen cum viro conditionis privatae descendere. Eodem modo cum Dux exercitus Albanorum, Tullum Regem ad duellum provocasset, Tullus recusavit; quod non inter eos, sed inter civitates Romam, & Albam contentio esset; ita provocatio Sertorii à Metello, Antonii ab Augusto, rejecta est, quod non expediret Duces Exercitus privatorum militum fortunis se committere.

Vid. Hayward, in Historia Edwardi sexti.

An miles inferioris gradus militem superioris ad duellum provocare possit?

CUm in Exercitu Regis Galliæ miles gregarius, vexillifero Cataphractorum, ut secum armis congredereetur diem dixerat, à Vexillifero excipiebatur, quod miles gregarius ipsi esset dignitate inferior, & proinde se ad duellum suscipiendum non teneri: At Johannes Jacobus Trivultius vir militaris disciplinæ prudentissimus, tunc Magister Militum Francisci Regis, hanc exceptionem rejecit; Quia cum miles gregarius nomen in Album militum dedisset, & ex militia nobilitas oriatur, ipse nobilis existimandus erat: Constitutio autem Longobardorum, inter provocantem & provocatum æqualitatem respicit, cautumq; in ea diserte est, ut Comes ab inferiore provocatus per Optionem sive substitutum pugnare possit, quemadmodum personis illustribus in criminalibus injuriarum judiciis per procuratores respondere permisum est. Paris Neapolitanus, ait, Si quis à quarta progenitorum serie, hoc est usq; ab abavo nobilis sit, quemcunq; etiam Ducem provocare possit, Alciatus aliter; scilicet, quod cum inter Dignitatum gradus aliquis sit ordo, ut primo Illustrium, deinde Spectabilium, tertio Clarissimorum: Is qui in eodem gradu Dignitatis est, etiamsi qualitatis inferioris, ab alio ejusdem gradus repelli non possit; unde Comes à Marchione, vel Duce non rejicitur, quia omnes sunt ejusdem gradus, Illustres scilicet; Et proinde ei, qui ab usque abavis nobilis est, & qui in armis ætatem egit, permittendum ut cum clarissimis congredi possint; cum illorum ultimus sit gradus, & inter eos modica sit inæqualitas.

Vid. Alciatum de Sing. certamine, cap. 33.

An in bello publico provocatus ad Duellum, privata amicitia causa, declinare possit?

Romanis contra Campanos ob defectionem bellum gerentibus, Badius Campanus, qui T. Quintio Crispino hospes erat per-familiaris, apud quem Badius ante defectionem, liberaliter, comi-terq;

terq; curatus fuerat, progressus ante stationes, evocari Crispinum iussit; quod ubi Crispino est enuntiatum, ratus colloquium amicū ac familiare quæri, manente memoria, etiam in dissidio publicorum fœderum, privati juris, paulum à cæteris processit. Postquam in conspectu venere, Provoco te, inquit Badius, ad pugnam Crispine: Conscendamus equos, summotisq; aliis, uter bello melior sit decernamus. Ad ea Crispinus, nec sibi, nec illi ait Hostes deesse, in quibus virtutem ostendant, se ab eo etiamsi in acie occurrat, declinatorum, ne hospitali cæde dextram violet, conversusque abibat; Enimvero ferocius tum Campanus increpare, malitiam ignaviamque, ad se digna probra in insontem jacere, hospitalem hostem appellans; simulantemq; parcere, cui scit parem se non esse; Si parum publicis fœderibus ruptis, dirempta simul, & privata jura esse putet: Badium Campanum, Tito Quintio Crispino, palam omnibus, duobus exercitibus audientibus renuntiare hospitium, nihil sibi cum eo consociatum, nihil fœderum, hospitium cum hoste; cujus patriam, ac penates publicos, privatosq; oppugnatum venisset; Si vir esset, congregaretur, Diu cunctantem Crispinum perpulere tumules, ne impune insultare Campanum pateretur; Itaq; tantum moratus, dum Imperatores consuleret, permitterentne sibi extra ordinem in provocantem hostem pugnare, permissu eorum arma cepit, equumq; conscendit, & Badium nomine compellans ad pugnam evocavit: Nulla mora à Campano facta est, infestis equis concurrere; Crispinus supra scutum, sinistrum humerum Badio hasta transfixit, superq; delapsum cum vulnere ex equo defiliit, ut pedes jacentem conficeret; Badius priusquam opprimeretur, parma, atque equo relicto ad suos confugit; Crispinus Equum, armaque capta, & cruentum cuspidem, insignis spoliis ostentans, cum magna laude, & gratulatione militum, ad Consules est deductus, laudatus ibi magnificè & donis donatus est.

Vid Livium, lib. 15. Valerium Max. lib. 5. cap. 1.

An qui die ad duellum confisus sero in campum prodiit causa cecidisse iudicandus sit ?

Cum Carolus Andegavenſis Comes Provincia, & Petrus Aragonenſis de regno Neapolitano contenderent, de conſenſu Martini quinti Pontificis Romani, convenit, ut uterque centum Equitibus comitatus in Civitate Burdegalenſi, quæ tunc erat ſub Rege Angliæ, certo die concertarent. Condicto die Carolus ſummo mane cum ſuis militibus comparuit, & uſque ad horam quintam poſt meridiem, hoſtem expectavit, quo non adventante, incuſata ejus mora, una cum campi Iudice diſceſſit, Eoque diſceſſo ſtatim Petrus ſupervenit, & hoſtem non inveniens, de ejus tergiverſatione, & ſua diligentia proteſtatus eſt, unde dubitabatur cujus cauſa melior fuerit. Pro Carolo arguebatur, quod ipſe juſto tempore adfuisset, & per longè majorem diei partem hoſtem expectaſſet, Pro Petro, quod ipſe tempore idoneo ad pugnam confiſciendam veniſſet, nec adverſarius uſque ad occaſum ſolis cum Iudice, quod oportuit, manſiſſet; Pro lite dirimenda alter dies à Pontifice Romano ad decertandum conſtitutus eſt, in quo cum Petrus venire recuſaſſet, eum deſeciſſe pronuntiatur, & ea ex cauſa regno privatus eſt.

Vid. Alciatum de ſing. certamine cap 41. Petrinum Bellu part. 2 cit. 15. nu 30

An hoſtes perſequi liceat in Amici territorio ?

Bello inter Romanos & Carthaginienses flagranti utrique cum Syphace Numidiæ rege pacem colebant, in cujus ditionis portu, cum ſeptem triremes eſſent Carthaginiensium, eo cum duabus triremibus Scipio advenit, quæ opprimi à Pœnis potuiſſent, priuſquam portum intraſſent, ſed vento acriori illati ſunt in portum priuſquam Pœni anchoras molirentur, tum vero Pœnos in regio portu, nihil auſos refert Livius. At hoſtis qui eſt ubique ſecundum juſ gentium impeti poteſt, ita Euripides, ubicunque, preſum, jura lædi hoſtem ſinunt, & Marcianus Jurisconſultus, Tranſfugas licet ubicunque inventi fuerint, quaſi hoſtes interficere, In territorio

territorio vero alieno, quod eos interficere, aut violare non liceat, id jus ex ipsorum personis non venit, sed ex jure ejus qui ibi imperium habet, Cum civiles societates constituere potuerint, in eos, qui in aliquo sunt territorio, nihil per vim agi, nisi tentato iudicio.

Vid Gentilem lib. 2. cap. 12. Eundem Advocat Hispan lib. 2. cap. 5. Grotium lib. 3. cap. 4. §. 8. Petr. Bellum part. 2. tit. 18. nu. 12. Bodinum l. 2. c. 6. nu. 68.

Utrum in hostili solo captum ducere liceat per Amici territorium?

Cum bellum inter Genuenses, & Mediolanenses moveretur, Praefectus cohortis Mediolanensis nobilem Genuensem, quem in praelio ceperat intra fines Genuenses, per Regionem Bononiæ, quæ est territorium Pontificis Romani, ad castrum Mediolanense perduxit, Et perducere potuisse videbatur, quia cum ab initio iuste caperetur, jure suo in Captivum Praefectus uti potuit, at Legatus Pontificis id in Domini præjudicium factum ratus, Johannem de Immola, celebrem Jurisconsultum consuluit, qui respondit, nullatenus fuisse licitum captivum per territorium Bononiense, licentia non impetrata, ducere, Immo injuriarum teneri eum, qui duxerat, & ad exhibendum Legato si petiisset, obligatum fuisse, Cujus sententia à Petrino Bello approbatur, quia alibi captus, nondum intra præsidia deductus, in alieno territorio detineri, vel coerceri non debet.

Vid. Iohanne de Immola consil. 50. Petrinum Bellum part. 2. tit. 18. nu. 12.

An Exteros in hostili solo deprehensos offendere liceat?

Corcyraei, Epidamnum obsessuri, peregrinis primum discedendi copiam faciebant, denuntiando alioquin pro hostibus futuros, & habetur in formula apud Livium Hostis sit ille quique intra ejus præsidia sunt. Quia ab illis damnum quoque metui potest. Quod verum in bello generali, non in repræfaliis, quibus obnoxii non sunt, nisi qui simul onera & munera subeunt, & de iis Peregrinis qui ante bellum venerunt, eoq; commisso & cognito intra hostium fines manent, non de iis qui bello moto, & incognito eo delati sunt.

Vid Grotium lib. 3. cap. 4. nn. 6

An

An ex persistendo in loco pugna de victoria statnendum sit?

ARgivi, & Lacedæmoniis de agro Thyreatico contendentibus, Amphictiones pugna utrinque selectorum hominum rem discernendum censuerunt; Lacedæmonii à sua parte Othriadem, summæ rei, Argivi Therandrum præfecerunt; Post prælium de Argivis duo superstites fuerunt Agehor & Chromius, qui de victoria civibus nuntium retulerunt, & postquam ii discesserant: Othriades vulneratus mortuorum Argivorum scuta collegit, & trophæum erexit, quod suo sanguine Jovi consecravit; Redintegrata lite de victoria, Amphictiones iterum Iudices constituti sunt, in quo iudicio Argivi victoriam suam pro majori superstitem numero contendebant: Lacedæmonii sibi vindicabant, quod illorum unus superstes, cum alii ex adversa parte, domum se recepissent, in loco pugnae persistit, & spolia collegit, & pro Lacedæmoniis sententia lata est: Gentilis vero, & Grotius, censent, quod et si qui locum pugnae retinent, victores creduntur; si tamen Argivos pro timore recessisse ostensum non fuisset, nullo modo pro victis habendos fuisse, maxime cum nocte superveniente abierint, victores se rati, & id suis renunciaturi.

Vid. Plutarch. collat. Græc. & Latin. Gentilem, lib. 3. cap. 15. Grotium, lib. 3. cap. 20. nu. 43.

An pro qualitate eorum qui cæsi vel capti sunt, an pro numero victoria sit habenda?

Philippus Rex Macedoniæ, & Attalus Rex Pergami, in prælio navali coierunt, in quo contigit, quod navis Philippi navem Regiam Attali, à suis desertam, ceperit; & in stationem non procul à pugnae loco deduxerit, unde victoriam sibi Philippus vendicabat; Sed uti ait Polybius magis pro victore se gerebat, quam victorem se sentiebat, cum ex suis multa hominum millia, naves sine comparatione plures amisisset, quando ex parte Attali naves pauculae, nec plures quam viri centum interierunt, quod Polybii iudicium, & Gentilis, & Grotius probant.

Vid. Polybium, lib. 16, Gentilem, lib. 3, cap. 15, Grotium, lib. 3, cap. 20. §. 45
An

An qui novis copiis supervenientibus cesserint . victi censendi sint ?

POST pugnam navalem, quæ ut Thucydides scribit , maxima omnium, quæ Græci cum Græcis intercefferat , utrinq; victoria vindicabatur : Corinthii quod Corcyreos ad noctem usque prælio superassent , depressis navibus circiter septuaginta , captivos non minus quam mille habuerint , naufragia plura , mortuosq; receperint , trophæa statuerunt : Corcyraei autem quod triginta ferè naves Corinthiorum corrupissent , aliæq; Atheniensibus supervenientibus cessum euntes pugnam detrectaverint , ipsiq; naufragia circa , mortuosq; colligendi potestatem fecerint , ob ea etiam trophæum statuerunt ; itaque , utriq; inquit interpretabantur se vicisse , Corcyraei vero sine causa , uti censet Grotius , cum Corinthii foelicius , contra ipsos pugnaissent , & non Corcyraeis sed Atheniensibus cesserint.

Vid. Thucydidem , lib. 1. Grotium , lib. 3. cap. 20. §. 45.

An præmium ei constitutum qui alterum occiderit , ei qui alterum in fugam egit debeatur ?

PARIS, & Menelaus de Helena concertaturi pactum inierunt , in quò ab altero propositum , ut qui alterum vicerit , ei Helena cum bonis omnibus concederetur , ab altero consensus est , ut qui alterum occiderit is Helena cum bonis potiretur. Certamine ingressò Paris in fugam se proripuit. Apud Plutarchum in Sympo-
siacis quæstio ventilatur , An Menelao Helena deberetur : Et alii debitam opinabantur , quia conditio prius oblata erat , si alter alterum vicerit , quod absque dubio Menelaus , qui Paridem in fugam egit , consequutus est , & quamvis postea responsum sit ; Si alter occiderit , id nihil operari , quia conditio ab uno oblata , ab alio mutari non potuit. Alii in ea erant sententia , quod verba posterioris conditionis ad declarationem prioris adhibebantur , quia incertum esse potuit , quando quis vinceret , certum autem esse ; Si alter occideretur : Ideoq; ea conditione deficiente , Menelao Helenam non
V
deberi,

deberi, & ita conclusum ait Plutarchus, quia ut in Legum repugnantiis Iudices id amplectuntur, quod nihil habet controversiæ, eo quod obscurum est repudiato, ita hic id pactum censendum, potius, quod finem notum certaminis exprimit, & nulli exceptioni est obnoxium: Gentilis vero ait, quod Paris in causa succumbere, & Helenam amittere debuit, quia per ejus fugam stetit, quo minus alius finis certamini imponeretur, cum Juris interpretes tradant; Si quis alteri promittit, aliquid dare; si aliter ipsum cursu vicerit, deinde ipse nolit currere, nihilominus tenetur idem dare.

Vid. Plutarchum in Symposiatu. Gentilem. lib. 3. cap. 15.

An si præmium ei propositum sit, qui primus urbis mures conscenderit, si duo simul conscendant, utriq; debeatur?

Capta nova Carthagine in Hispania Pub. Scipio cum virtutē militum qui muros conscenderant remunerare vellet, præcipuum muralis coronæ decus ejus fore qui primus murum conscenderat, pro concione dixit, & duo professi sunt, se ascendisse, nec satis constare poterat, uter eorum primus, quod pariter ascendissent: Livius refert, Scipionem, ambos muralibus coronis vir tutis causa donasse. Ulpianus vero Jureconsultus, ait, si Legatum fuerit relictum, ei qui primus Capitolium ascenderit, si simul duo venisse dicantur, nec apparet, quis prior venerit, neutri deberi legatum: Et Hugo Donellus in Commentario ad illam Ulpiani disputationem, ait, Scipionem magis ex gratia quam de jure egisse, idq; Scipionem satis intellexisse, cum privatim declararet, non ideo se ambobus dedisse, quia deberet, sed quia rem pro tempore dissimulare, utile judicabat; scilicet ut refert Livius; ut seditionem compesceret, ad quam res spectare videbatur, propter studia partium, erga suos commilitones, si unum alteri prætulisset, aut dedisset neutri. Grotius tradit Chrysippum olim hanc quæstionem tractasse, An præmium ei, qui primus ad metam pervenisset; debeatur utrique, si simul pervenerint, an neutri; Quia vox Primi ambigua est, nam significat aut eum qui omnes antecedit, aut quem nemo. Sed quia præmia favorabilia sunt, verius esse concursuros ad præmium, quanquam liberalius non solum Scipio, sed & Cæsar, & Julianus,

lianus, iis qui pariter muros ascenderunt solida præmia tribuerint.

Vid. Livium, Decad. 3. lib. 6. Ulpianum D. de rebus dubiis, l. 10. Et ad eam Donellum. Gratium, lib. 2. cap. 16. nu. 19.

An facialis ad externas regiones transeuns veniam impetrare teneatur?

Ferdinandus Gonzaga Francisci primi Regis Galliarum Ecclesiam in Germaniam missum, in custodiam mitti iussit, & edicto Cæsarei consilii, idem, & finibus Germaniarum egredi iussus est, & denuntiatur. Ne quisquam alius ejusdem conditionis in posterum limites Imperii, nisi prius impetrata venia, ingrediatur, de quo facto Obsecro, inquit Paschalius, ubi Lectum aut fando auditum Caduceatori impetrandam veniam aut securitatem, cujus officium hæc ipsum aliis impetrare, quique peculiare jus habet eo penetrandi quo Legatis aut illicitum est aut intutum, quod censuisse videtur Rex Argivorum apud Æschylum, qui miratur Dania das, aulæ fuisse ingredi ditionem suam, non præmissa Caduceatore.

Vid. Paschalium. cap. 3. §. 22.

Utrum cum iis qui non sunt justis hostes sit jus Legationis?

Theodosius Imperator Legatum Tyranni cujusdam sibi rebellis in carcerem conjecit, & reprehendit Cicero quod ab Antonio Legatus admissus est, cui portas urbis patere jus non erat, censuitque eidem reditum ad Antonium denegandum. Alexander tamen, uti refert Curtius, cum viginti millia Latronum obsedisset, & Barbari, Legatos misissent, eos protenus admitti iussit: Et Cæsar libro tertio de bello Civili, expressè ait, Fugitivis & prædonibus è saltu Pirenæ licuisse legatos mittere. Verum habetur, justis duntaxat hostibus esse jus Legationis, & quod ab aliis aliquando legati admissi sunt, id petmissum, non in eorum favorem, sed boni communis causa, cum alias omnia reconciliationis media tollerentur,

tollerentur, multo magis si huiusmodi Legatis fides data est, ea omnino violanda non est.

Vid. Ærod rerum judicat. de Legat. c. 23. Gentilem de Legat. l. 2. cap. 3. Grotium, lib. 2. cap. 18. §. 2.

An in castra & loca obfessa Legati hostium admittendi sint?

Legati Brutorum, qui hostes erant Romanorum à Tito Quintio in castra admissi non sunt, & Constantius Legatos Magnentii castris exclusit: Et eadem ratio habetur in locis obfessis, itaq; Gothi qui Urbinum præsidio tenebant, Legatos Bellizarii, eos inde propere facessere jusserunt. Quod maxime rationi consentaneum est, cum qui in castris, vel loco obfesso sunt, suis viribus minus fidunt, qui vero se multo potentiores hostibus non dubitant, eorum legatos etiam in castra admittere minus extrinsecunt. Ita ab Alexandro Legati Scytharum viginti equis inveci per castra deducti in tabernaculum admissi, & confidere jussi sunt, & Consules Romani qui Uticæ erant, Legationem Carthaginensium sic admiserunt, Uterque Consul confedit sublimi solio, astantibus utrinq; ducibus, Tribunis ac agminibus Legionum, fulgentibus Aquilis, signisq; ubiq; fixis ut hinc Legati, copiarum numerum planè formidabilem agnoscerent, tum, jussu Consulum tuba silentio indicto Præco effatur, Accedant Legati Carthaginenses, Illi per Ordines armatorum transeuntes, ad Locum Tribunalis, pervenientes, jussi sunt à Consule, quid petentes venissent exprimere. Ita anno 1576. Rosenbergius Eques Bohemus, à Maximiliano Cæsare, ad Polonos Legatus, per media castra, intèrq; equitum refertissimas turmas exceptus, productusq; ad locum, ubi Senatus frequens confedit: Unde comperit habuit, quam ridiculè falsum fuerit, quod à nonnullis Cæsari persuasum fuit, Stephanum Battori, ab ea regni parte, quæ facile contemni possit, Regem designatum fuisse.

An Legatam ad hostem transeuntem interciperi liceat?

Cum Fregosius, & Rinco Francisci Regis Galliæ Legati occulte per Italiam ad Turcam contendentes capti, & occisi essent, Rex Galliæ de gravi injuria contra jus gentium perpetrata questus est. Perfixæ autem Regis Legatos ad Lacedæmonios ab Atheniensibus interceptos refert Thucydides; & Legatos Carthaginensium, ad Regem Macedoniae euntes Romani interceperunt, Quod dubitationem non habet, si justa sit suspitio, eos aliquid moliri contra eos per quorum territorium transeunt, quod si constet ab alia & separata negotia missos esse, minus justum est eos impedire. Itaq; Alexander magnus capta Tyro, Carthaginensium Legatos inviolatos dimisit, uti refert Curtius, quia aderant ibi ad celebrandum anniversaria sacra.

Vid. Bodinum, lib. 5. cap. ult. Besold, de Legation. cap. 5. nu. 15.

An Securitas itineranti concessa, paranti se ad iter debeatur?

Iohannes de Figueroa Dux Exercitus Philippi Regis Hispaniæ, saluum conductum concessit Marchioni Messarani (qui erat factionis Gallicæ) eundi à Castro suo, Venetias; postea idem Dux invalit terras dicti Marchionis, ipsum captivum fecit, & ab eo redemptionis pretium exigebat: Prætendebat quod Securitas, data erat, ut iter facere tuto posset, non ut domi tuto moraretur, Ibi captum fuisse, ubi consilio, & opibus hostibus auxiliari potuit. Pro Marchione ferebatur, quod ad iter se parabat, cum captus fuit & pro itinerante haberi debuit, quod cui plus concessum erat, transire scilicet, per territorium Regis Hispaniæ, quod minus, scilicet domi suæ manere dum iter pararet, ipsi periculo futurum, neminem suspicari potuisse. Petrinus Bellus refert se, cum esset unus Iudicum, Literni indecisam reliquisse, & Lectori relinquit iudicium.

Vid. Petrin. Bellum, part. 3. tit. 1. nu. 15.

An cum securitas eundi data est, etiam redeundi concessa intelligatur?

Bartolus, Angelus, & alii DD. dicunt, Quod Securitas data pro eundo, censetur etiam data pro redeundo, quia non dicitur securè venisse, cui non licet tutò recedere; Et quia tempus accelsionis, mansionis, & regressus, a pari judicantur. Alexander vero, Geminianus, & alii tenent contrarium; Quòd Imperatores Constantinus, & Julianus, verbis expressis, Navicularios venientes, & remeantes securitate potiri statuerunt. Petrinus Bellus, putat, variè posse responderi, pro subiecta materia, & mente concedentis. Nam si Dux belli concedat hosti securitatem veniendi in suum præsidium, & ibi commorandi per triduum, absurdum esset, si lapsò triduo, eum tuto abire non pateretur: At si concedat ut eat Romam, aut ut eat in Galliam, ipsa itione consumitur actus, nec à verbis est recedendum.

Vid. Petrin. Bellum part. 9. tit. 1. nu. 21. & DD. ab eo citatos.

An Securitas eundi data, ad primum duntaxat eundi actum, sit restringenda?

Iurisperiti communitè dicunt, Securitatis Licentiam restringi, ad actum primum, nec iterationem permitti, cum distinctione tamen, videlicet, ut si Petitio fuerit simplex, & indeterminata, & concessio determinata pro una, vel pluribus vicibus, secundum concessionem determinatam, securitatem esse intelligendam: Et si determinata fuit petitio, & securitas simpliciter; & indeterminatè concessa, secundum petitionem esse præstandam; Si vero simpliciter, & indeterminatè facta sit petitio, & eodem modo simpliciter, & indeterminatè securitas sit concessa, intelligendam semel duntaxat, & pro prima vice. Nisi causa petendi aliud suadeat, ut si petita & concessa sit, ad tractandum de pace; nam tunc præstanda est Securitas, toties quoties, pendente tractatu Pacis.

Vid. Bartol. ad L. 1. D. ad L. Iulian. Majestatis, Petrinum Bellum part. 9. tit. 1. nu. 24. & DD. ab eo citatos.

An

An Securitate eundi alicui data, is possit alium mittere?

Cum esset Securitas data cuidam Marcello, veniendi ad Civitatem Astensem, cum decem equis, & rebus aliis, Marcellus suo loco uxorem misit, unde Equi, & res aliæ interceptæ sunt. Baldus affirmat, licuisse ei uxorem mittere, propter unitatem vigentem inter conjugatos, & Equos, & res alias restitui debuisse, quia verbis expressis continebantur in diplomate Securitatis. Grotius vero de hac quaestione, & præcedentibus, ita statuit, Cui abire datum est, non datum est redire, sed nec cui venire concessum est, is mittere poterit, sunt enim hæc diversa, nec extra verba, ratio expatiari cogit: Sed & cui venire permissum est, is semel veniet, non iterum, nisi adjectio aliam conjecturam suppeditet.

Vid. Petrinum Bellum part. 9, tit. 1. nu. 13. Et DD. ibid. Grotium, lib. 3. cap. 20. §. 16 Gentilem, l. 2. c. 14.

Utrum Securitatem in pace datam, bello erumpente violare liceat?

Cum ratione induciarum inter Cæsarem, & Gallorum regem pax vigeret, quidam Germanicus Savorganus, Regis Galliarum miles, haud ignobilis, impetravit, à Francisco Estensi, Ferdinandi Gonzaghæ Imperialis Ducis substituto, saluum conductum divertendi ad Aquas Statiliensium in Liguria, sanitatis recuperandæ causâ, quò vix devenerat, cum Galli duo præsidia Cæsarianorum invaserunt, subitòq; exarsit bellum: Diffidens igitur Germanicus salvo conductui revertebatur ad suos, retentusq; est Hastæ, per Franciscum Estensem Præsidii præfectum: Causæ prætendebantur, Quia Securitatis concessio intelligenda erat, rebus in eodem statu manentibus, at hic sequuta erat maxima rerum novatio, factò, & culpa militum Regis Galliæ. Intererat etiam Cæsaris, eum detineri, quia Hastæ præsidium circumspexerat, & munitionum defectus observaverat. Petrinus Bellus tamen, Ferdinando, & Francisco Ducibus suavit; Fidem Principis nec cavillationibus obtegere, nec argumentis subvertere fas esse; Neque id ferre decorum ei, qui & fidem dederat, & detentionis, ac liberationis esset arbiter;

arbiter ; quibus obtinuit , ut Germanicus dimitteretur , sed aliquanto serius , propter debilitatem castrorum Hastensium , & præsidii.

Vid. petrin. Bellum. part. 9. tit. 1. nu. 30.

An dimissus sub conditione revertendi , si alter pro ipso non redatur , teneatur , si alter interim moriatur ?

Guicciardinus , & Jovius referunt Balioneum quendam , captum , dimissum sub conditione revertendi , si non alter utpote Titius , pro eo redderetur , & Balioneum Titium ad hostes eoque deduxisse , quo sine Caduceatore proficisci poterat , illic autem dum Caduceatorem expectat à Duce , qui se dimiserat , & cui Titius reddi debebat , minorem Ducem irritam voluisse permutationem , & interim Titium fuisse mortuum. In quo casu , Gentilis ait , quòd hic nihil contra Balioneum dici possit , cum sit pro regula : Quoties per eum , cujus interest conditionem impleri , non stet quo minus impleatur , perinde haberi ac si impleta fuisset. Grotius vero ita statuit , Quod factum tertii liberaliter promissum , satis impletur , si nihil omissum sit ex parte promittentis , sed quod in onerosis promissis , obligetur ad id , quod tantumdem valet ; unde in questione , non tenetur dimissus se custodiæ reddere , neque enim id actum intelligi patitur favor libertatis , sed ejus quod præstare potest , æstimationem præstare debet.

Vid. Gentilem , lib. 2. cap. 25. Grotium , lib. 3. cap. 21. §. 30.

Utrum tempus Induciarum à momento , vel à die sit computandum ?

Induciz quinquennales inter Philippum Hispaniarum Regem , & Henricum Francorum , ultra montes , quinto die Februarii , anno 1555. pactæ sunt ; in quibus cautum erat , ut ab eo die bellum suspenderetur. Eodem die Dominus de Brisac , Dux exercitus Francorum citra montes , Vignale præsidium Hispanicum expugnavit : Quærebatur , an Præsidium à Gallis retineri posset , quasi captum

captum durante bello? An restitui deberet, quia captum cum bellum per inducias suspenderetur? Quod retineri potuit videbatur, Quia, Ab eo die, id est, post diem finitum bellum suspendebatur; Contra restitui debere, quia verba, Ab eo die (uti Jurisconsulti asserunt) possunt intelligi ab eo die inchoato, ita ut totus dies includatur, quodque in favorabilibus, (cujusmodi sunt effectus induciarum, cessatio scil. ab armis, & retentio possessionis) hæc plenior interpretatio admittenda est. Petrinus Bellus censuit, à Momento esse computandum, Quia ut iniquum est, quod perfectis induciis, bellica tractentur; ita absolum, non licere facere, quæ ad bellum pertinent, donec induciæ concludantur. Grotius de tempore quo Induciæ terminetur, ita statuit. Tempus induciis præscribi solet, aut continuum, ut in centum dies, aut cum designatione termini, veluti usque ad Calendas Martias: In priori casu ad momenta temporum facienda est numeratio: Id enim naturæ convenit: Nam quæ fit ad Civiles dies computatio, ex Legibus, aut moribus populorum venit. In altero genere dubitari solet, Utrum Dies, aut Mensis ad quem dictum est duraturas inducias, comprehensus intelligatur, & videtur comprehendendi; Ut Si quis dixerit, ut intra diem mortis ejus aliquid fieret, ipse quoque dies, in quo quis mortuus est numeretur: Ita Spurrinna Cæsari prædixerat periculum, quod non ultra Idus Martias proferretur, & interpellatus ipsis Idibus, dixit venisse quidem, sed non præterisse: Quæ Interpretatio, inquit, multo magis sumenda est, ubi temporis productio favorem in se habet, utpote in Induciis quæ humano generi parcunt.

*Vid. Petrinum Bellum, part. 5. tit. 3. nu. 16. Grotium, lib. 3. cap. 21.
 § 4. Gentilem, lib. 2. cap. 12.*

An qui post tempus Induciis præstitutum, ex necessitate in loco hostili repertus est, belli incommodis sit obnoxius?

IN Pacto induciarum continebatur, ut Hostis qui nobiscum erat, ante Idus Martias è portu solveret; Aliquis adversa valetudine, vel tempestate abnavigare impeditus, vel vento in portum relatus est: Deinde iterum post Idus Martias exire voluit, Quæritur, An beneficio induciarum uti possit? Respondit Bartolus, his ipsis terminis, Repertum in portu hostem, impune occidi posse, nec curandum esse de modo, quo ultra tempus retentus est. Besoldus, repudiata tam inhumana sententia, utpote ab æquitate naturali remota, & à Juris textibus aliena, illi jus induciarum tribuendum, nec casum improvisum quicquam obesse contendit. Hac tamen limitatione adhibita, nisi ita se arctâssent, ut necesse esset, illum in talem casum incidere. Grotius vero, cum Bartolo consentit, & ait, quod in casu hujus quæstionis, propriè de pœna non agitur, sed de jure, quod certo tempore interquiescebat; unde hic, par ei videtur, qui cum in pace venisset, repente bello exorto, inter hostes fato suo deprehenditur, sed quin talem, inquit, remittere, benignius, & generosius sit, dubitationem non habet.

Vid. Bartol in Repetit. L. Cæsar, nu. 15. D. de Publicanu. Besoldum de Pacis jure, cap. 6. nu. 5. Gentilem, lib. 2. cap. 13. Grotium, lib. 3. cap. 21. §. 9.

Utrum Inducias violatas, intra tempus Induciarum ulcisci liceat?

CUm induciarum tempore, Carthaginienses disjectam vi tempestatis Romanam classem, invasisent, & intra easdem inducias, Carthaginiensium Legatos fortuna Africano majori in manus objecisset: Præfatus, eos non induciarum modo fidem, sed etiam jus gentium violasse, Nihil tamen se facturum dixit institutis populi Romani, vel moribus suis indignum. Et vero è Jureconsultis aliqui negant, violatis induciis ex altera parte, ex altera violare licere, sed sufficere quod finitis induciis ulcisci fas sit. Alii aliter

aliter statuunt, maximè in Induciis longi temporis, & in locis propter vicinitatem offensionis opportunis: Ne melior sit conditio fœdisfragi, & perfidi, quam fidelis, & iusti. Africani exemplum, urbanitati magis, quam iustitiæ tribuunt.

Vid. Petr. Bellum, part. 5. tit. 3. nu. 1. & D.D. ab eo citatos.

An mulieres captæ pretio fini redimende?

Cum Hispani peterent mulieres captas ab Italis sine pretio sibi reddi, Itali hoc se facturos negabant; Pro Hispanis ratio fuit humanitatis, & mos antiquus, ut imbelles genus censeretur, omni vexatione indignum: Pro Italis recens clades Romana fuit, in quâ puellas, etiam infantes ab Hispano auri multa redemerunt; Gentilis dicit ius pro Italis fuisse, qui exemplum iniustitiæ quod Hispani dederunt, Hispanis reddere potuerunt. Nobilis autem erat Regis Gallorum definitio, quâ & approbata fuit iustitia Italarum, & defensum unâ, ius istud quod dicimus scæminarum; Nam rex pecuniam Italis largiebatur, & Hispanis scæminas liberaliter restituit.

Vid. Gentilem, lib. 2. cap. 2. vel 11. q.

An qui in iusto prælio capti sunt, majori pretio, quam qui alias in bello capti redimendi sunt?

Bello Neapolitano inter Ferdinandum Regem Hispaniæ, & Ludovicum duodecimum Galliarum Regem, de Gallis ad Rubum captis; uti refert Mariana, magno animorum motu utrinque disceptatum est: Convenerat inter Exercitus, ut Equiti capto, equo, & armis detractis, libertatem redimere fas esset annui stipendii quarta parte exolutâ; cæperant Galli diebus superioribus Theodorum Bocalum Epirotarum equitum Ducem, Diegnam Verum, rei tormentariæ magistrum, atque Escaladam centuriæ Hispanorum Præfectum, aliosq; ad triginta, & cæteros quidem missos fecerunt; qua lege & pretio erat constitutum, hos tres vero retinere, causati Duces eos esse, nèque debere communi legi comprehendi,

prehendi, quorum esset dignitas major, eos à vulgi conditione eximendos videri, Nunc quasi sui obliti, postulabant tamen Gallos ad Rubum captos, pacto prius pretio dimitti non considerantes, viros primarios esse plerosque, eosque esse Ordinum Ductores, Præterea, Gonsaluo Hispanorum Imperatori renuntiatum, Legem eam militiæ Neapolitanæ, quarta stipendii parteequitæ redimii, non extendi ad eos, qui in iusto prælio, aut oppido per vim capto in potestatem venissent. Consulti milites veterani, nobilesque Provinciæ proVectæ ætatis, Non aliter Provinciæ moribus observatum responderunt. Verum an ad gratiam, inquit author, curiosè non inquirendum arbitror, In eam certe sententiam responsum Gallis est datum, ut Captivi de libertatis pretio cum iis constituerent, in quorum potestate erant, neque communi cæterorum privilegio se tuerentur, In quo non lucro paucorum consultum arbitratur, sed eo prætextu cautum. Ne viri pugnaces prælio interessent, quod ut res se dabant, brevi de rerum summa futurum videbatur.

Vid. Marianum de Rebus Hispan lib 27 cap. 18.

An miles privatus id quod hostis ob redemptionem pactus est, præstare teneatur?

Cum à Lusitanis, tres capti essent, & unus ex conditione missus, ut pecuniam pro tribus afferret, & nisi rediret, duo pro eo quoque pecuniam darent, isque reverti noluisse, & ob hanc causam, illi pro tertio quoque pecuniam solvissent, Servius Iurisconsultus respondit æquum esse Prætorem in eum iudicium reddere: Quia inquit, Geutilis, ille redire tenebatur, nam nisi teneretur, negotium inutiliter gestum fuisset. Est tamen magna altercatio interpretum, An miles privatus, dimissus, fide data, de solvendo pretio, aut de redeundo ad hostem hoc pactum servare teneatur. Nam Bartolus, Baldus, Angelus, & alii, negant quidem, pactum servari oportere, quorum opinionem Zazius in disputatione contra Eckium, acriter, & latè defendit. Contrarium tenent Decius, Alciatus, Duarenus, Covarruvias, Garfias, Hotomannus, & Bodinus, qui dictum Bartoli levius esse ait, quam ut refelli debeat, sed & in contrarium est Consuetudo, uti testatur Fulgosius, Laudatissimus habetur

betur, Regulus, ob sic servatam fidem, & à Romanis ad Annibalem remissus miles est, qui sic fidem datam fallere conatus est. Concedunt tamen Covarruvias, & Garzias si quid promissum sit contra jus publicum, aut militare, promissionem servandam non esse in quibus Gentilis ponit, si quis promisit non militare, pro suo Principe, aut patria, Nam etsi teneat pactum de revertendo ad Hostes, per quod quis se eripit Principi, aut patriæ, hoc tamen est, quoniam etiam per Captivitatem ereptus est, Nam ut quid non sit, contra utilitatem publicam concedi potest, sed ut quid sit, & partibus suis non fungatur, concedi non potest, nam contra naturam, id est, Grotius, cum Gentili, contra Bartolum censet, & miratur, inventos juris magistros, qui docerent, pacta publicè cum hostibus inita fidem astringere, at quæ à privatis non item, Nam cum privati jura privata habeant, quæ obligare possunt, & hostes capaces sint acquirendi juris, quid esse potest quod obligationem impediat, At quousque se extendat privatorum potestas, in paciscendo difficilius, inquit, est inspectio, Et quoad pactum Ne quis adversus eum in cuius potestate est militet, quanquam alii pactum, irritum prouenerint, quia est contra officium quod patriæ deberur, Ille aliter statuit. Quia non quicquid contra officium est, id statim irritum est, sed & quia contra officium quidem non sit, libertatem tibi parere, id promittendo, quod jam est in Hostis manu. Nihil enim, inquit, deterius sit patriæ causæ, cui is qui captus est, nisi liberetur, periusse censendus est.

Vid D de Negotiis gest l 21 Gentile lib. 2, cap 11. Hotomannum quæst. illust 7. Grotium lib. 3 cap. 2 §. 1. 5. & 8

An Conditiones deditiois à Duce concessæ, à suprema potestate præstandæ sint ?

Cum Maharbal Romanis quibusdam, qui ex prælio ad Thrasymentum evaserant fidem dederat, non tantum vitæ servandæ, sed si arma traderent, permittendi abire cum singulis vestibus, Annibal qui longè satis tunc aberat, eos postea detinuit, causatus in potestate Maharbalis non fuisse, ipso inconsulto fidem dare se deditibus, quæ ipsos illæsos, aut indemnes præstaret, de quo factum Li-

vius iudicium suum sic exponit. Punica fide, & Religione id ab Annibale factum. At cum Sophonisbæ, quæ in bello capta erat, à Masanißsa Duce libertas concessa fuisset, Scipio censuit, de ea Senatus, populique Romani iudicium fuisse, ideoque à Masanißsa quo Duce capta erat, libertatem ei dari non potuisse. Grotius sic definit Homines, agros & bello quæsitos, concedere Ducum non est. At nondum quæsitæ condonare, omnino est in potestate Ducum, Quia oppida pleraque, & Homines sæpe se dedunt, sub conditionibus vitæ salvæ, aut & Libertatis, & bonorum, de quibus summæ potestatis arbitrium exquiri res plerumque non patitur.

Vid. Grotium lib. 3. cap. 20. nota 9. & annotat. ibid. Camdenum Eliz. anno 1594.

An ferius se dedentes sint recipiendi?

Iones ubi audiverunt Lydos à Persis victos, Legatos miserunt ad Cyrum, ultro postulantes ut iisdem cōditionibus eos admitteret, quibus Cræsi subditos in deditionem acceperat, Cyrus vero iis sic respondit. Tibicen quidam, cum pisces in mari conspexisset, tibia canere cœpit, ratus eos ad cantus suavitatem in terram progressuros, sed spe sua frustratus, misso in mare verriculo, ingentem piscium numerum comprehendit, & traxit in terram, Et cum palpitantes cerneret. Temperate, inquit, quæso, à saltationibus, quando non libuit me canente, saliendo progredi. Quæ dixit, inquit Herodotus, quod Iones prius, ipso Cyro per Legatos flagitante, ut à Cræso desciscerent, pertinaciter renuerunt, ac tum rebus ex sententia non succedentibus parati essent Cyri imperata facere. Eo animo Dux Albannus Prosperum Columnium reprehendit, quod arcem quæ jam fuisset tormentis diverberata, in deditionem acceperat quia indignos censuit, quorum vitæ aut bonis parceretur: Scipio autem admotis jam scalis ad mœnia urbis Hispaniæ, Oppidanis per Caduceatorem abitum pacatum petentibus, annuit, & receptui cani iussit, & cum auditum non esset, nec obtemperatum, sed urbs vaciperetur, factum emendavit, etiam & punivit suos. Et Cicero ait, Hi qui armis positis, ad Imperatoris fidem confugiunt, quamvis Ariem murum percussit, recipiendi sunt.

Vid. Herodotum in Clio; Gentlem lib. 2. cap. 17.

An

An qui militibus libertatem pactus est, Ducem detinere possit?

Natalis Comes refert, de Imperatore, qui pactus ut Præsidium abiret, Præfectum retinuit; Cavillatione absurda, inquit Gentilis, quod, ut in familiæ appellatione Paterfamilias, ita Præfectus est in præsidio, & præsidii appellatione continetur.

Vid. Gentilem, lib. 2. cap. 14. Grotium, lib. 3. cap. 21. §. 5.

An qui pactus est Exercitum abire. subditos suos in exercitu militantes detinere possit?

Hispanus cum pepigisset, ut Exercitus Gallicus ex regno Neapolitano abiret, id pactum de Neapolitanis qui erant in exercitu Gallico intelligendum negabat, & iuste uti censet Gentilis. Quia etsi non potuerit quicquam gravius statuere, propter regni illius jus maxime controversum, retinere ramen potuit, quos suos existimabat, & Galli debuerunt in pactione de Neapolitanis mentionem expressam facere, quia ad hærentes in pacto, nisi expressi sint, non continentur.

Vid. Guicciardinum, lib. 6. Gentilem lib. 2. cap. 18.

An iis qui fidei, & clementia sese dedunt, vita sit præstanda?

Civitas Faliscorum, quæ aliquoties rebellaverat, semperq; adversis præliis confusa fuisset, tandem Quinto Luctatio Consuli se dedere coacta est, Adversus quam Populus Romanus sævire cupiens, postquam à Papyrio, cujus manu, jubente Consule, verba deditionis scripta erant; edoctus est Faliscos non potestati, sed fidei Romanorum se commisisse, omnem iram placida mente deposuit, & viribus odii, non facile vinci assuetis, uti ait Valerius Maximus, ne Justitiæ deesset, obsistit. Et uti refert Diodorus Siculus, cum post fufum Atheniensium exercitum, à Syracusanis deliberatum est, quid de captivis fieret, & alii ad unum omnes trucidandos censerent; Senex quidam Nicolaus nomine, pro humanitate

nitare erga eos extendenda differens, dixit. Tradiderunt se cum armis, confisi clementiæ victoris, quare indignum esset, eos decipi spe nostræ humanitatis, & postea. Quis unquam Græcorum, Eos qui se clementiæ victoris permiserunt indeprecabili supplicio puniendos censuit. Cum tamen Phaneas Ætolorum (qui se suaque fidei Populi Romani dedidissent) Legatus, Manio Romano Consuli postulanti, ut quidam belli incentores, sibi sine mora dederentur, respondisset: Se non in servitutem, sed in fidem tradidisse, & quod imperabatur, non esse moris Græcorum, retorsit Consul, Se nihil curare, quid esset Græci moris, se more Romano imperium habere in deditos, suo decreto, & Catenis Legatos vinciri iussit. Quod iis qui ita se dedunt, vita sit præstanda, facit quod tradit Baldus Iureconsultus, qui ait, Si hodie aliqua Civitas exemplo antiquæ deditiois, alteri se dederet, ut posset victor de ea facere quicquid liberet, non deberet tamen vitam adimere; Et Alii affirmant, Si quis se remittat bonæ gratiæ alterius, non poterit corporaliter offendi: Eo enim, quod ita se committit, censetur tacite actum, quod fiat gratia, atque idem esse, si se submittat alterius voluntati: De quibus Petrinus Bellus, ista inquit, sunt valde pertinentia ad rem bellicam, propter istos dedititios, qui cum præsidium sibi commissum, ultra tueri non valent, dedunt se, ad discretionem, & quandoque alii furcis suspenduntur, alii deportantur ad triremes, quod non debet fieri; Nam discretio importat arbitrium boni viri. Gentilis, qui de interpretatione huiusmodi verborum in Deditioibus consuetis, latè disputat, de omnibus concludit ad vitam saltem tuendam, esse extendenda. Monet tamen se non loqui de Subditis, illi enim etsi arbitrio sese dedunt, multo efficacius se submitisse videntur. Grotius, ex verbis Manii Consulis, etsi Legatos Ætolorum demisit, infert, quantum impunè, & non violato jure gentium, facere possit is, in cujus fidem populus aliquis se permisit, atque affirmat, iis verbis, nihil aliud, quam meram deditio-nem intelligi, neque fidei nomen, iis in locis aliud significare, quam ipsam probitatem victoris, cui se victus committit; deinde affirmat, se existimare non referre, an dedens se dicat, se dedere alterius sapientiæ, an moderationi, an misericordiæ, hæc enim omnia blandimenta sunt, pro qua opinione facit, quod ex Polybio assert; Apud Romanos idem valent. Se in fidem alicujus committere, & victori

victori de se statuendi liberam potestatem facere. Ad officium vero ejus cui facta est deditio, refert illud Senecæ, Clementia liberum arbitrium habet, non sub formula, sed ex æquo & bono iudicat, & absolvere illi licet, & quanti vult taxare litem.

Vid. Valerium Maximum lib. 6. cap. 5. Petrinum bellum part. 2. tit. 3. §. 5. in fine Gentilem lib. 2. cap. 17. Grotium lib. 3. cap. 20. §. 50. & annot. ibid.

An dedentes se paſſi de vita, vel incolumitate, ſervi fieri, vel captivi detineri poſſunt?

Carolus quintus Imperator, Lantgravium qui fide accepta de incolumitate, ipsum accessit, custodiæ demandavit, & dictum est apud Jovium fide integra servos factos à Turca, qui incolumitatem paſſi erant, Quæ fieri non debuisse videbantur, Quia non in litem à specie servientium differunt, quibus non datur facultas recedendi, Et servitus in jure mors est, vel morti æquiparatur. Gentilis ait, Quod pactus de vita tantum, potest servus fieri, nam subtilitas est juris civilis, quæ servos pro mortuis habet, & multo magis poterit captivus haberi, qui servus non est. Quod à Gonzaga factum à Jovio perhibetur, at non probat servos factos à Turca, qui incolumitatem paſſi erant, quia, in hoc verbo, aliquid amplius quam in vita videtur, esse, sed & notatum ait factum Caroli quinti, qui eum, cui fides data est de incolumitate, incarceravit.

Vid. Gentilem lib. 2. cap. 17. Jovium lib. 37.

An mulieribus quibus permiſſum, ſecum portare quod poſſent, viros exportare liceat?

Cum Rogerius Rex Siciliae, & Pontifex Romanus, Guelfonem Bavariae, ad concipiendum bellum contra Conradum tertium Augustum, excitassent, cum eo signa contulit Henricus Caesaris filius, in oppido Gibellino natus, quo etiam, memoria natalium, velut gentilitio nomine, gaudebat, In ejus acie Io Gibellini, in altera Io Guelfe clamabatur. Hoc bello cum Caesar victor oppido capto, in viros durius consulere statuiſſet, mulieribus emigrare promiſit

promisit, rerum suarum jure concesso, quantum quaque posset humeris efferendarum. Flagrantissimus verò amor, & menti consilium & infirmitati robur dedit, Viros exportarunt, hoc egregio dolo, se captum, delusumq; Cæsare non indignante, victor etiam, victum Ducem positis armis in gratiam recepit. Nomina tamen mansere, & ex eo tempore servatum, ut Guelh Pontificum, Gibellini Cæsarum partes dicantur. Hæc Paulus Æmylius, de facto mulierum, Gentilis Pia fraus inquit, Nam quæ animalia sunt, ducuntur, aguntur, non portantur, quod non per deridiculum, & per calumniam tamen intelligendum.

Vid. Paulum Æmylium lib. 7. Gentilem lib. 2. cap. 17

An pælli exire cum vestibus, cum armis exire possint?

CHoronenses Chiis, qui Leuconeam ipfiseripuerant, bellum intulerunt, quorum viribus obsistere cum Chiis nequaquam possent, his conditionibus deditionem fecere, ut sibi cum Chlamide, & singulis vestibus urbem egredi liceret, Quo audito, Chiorum mulieres gravissimè viros accusabant, quod relictis armis, nudos se armatis hostibus credere statuissent, cumque illi se jurejurando astrictos, non amplius decernendi compotes esse dicerent, mulieres arma nequaquam dimittenda suaserunt, præsertim cum & datæ fidei suæ rectè consulere possent, si dicant hostibus hastam pro tunica, & clypeum pro chlamyde viris fortibus esse. Harum consiliis viri assentientes, statuto ad profectionem die, armati subito in medios hostes prodire, quorum audaciâ illi perterriti, cum egregiè instructos atq; ad omnia paratos conspicerent, neque illorum iter demorari, neque adversum eos procedere ausi sunt, bene secum agi existimantes, si illi, cætera omnia relinquentes, discederent. Apud Egelippum miles Romanus dicebat. Aliis arma oneri sunt, nobis integumento, & cum Sabinis portæ proditæ sunt à virgine Tarpeia, Capitolio præfecti filia, quæ pretium prodicionis quæ gerebant in sinistris petierat, dubium clypeos, an armillas, Illi ut fidem solverent, & ulciscerentur, clypeis obruere. Gentilis vero aliud vestes aliud arma significare, ex jure ostendit, & in hujusmodi pactionibus arma à vestibus distingui solere, & quod lingua vulgari.

gari, & intelligentia communi usurpatur, observandum esse.

Vid. Plutarch. de clar. mulieribus Gentilem lib. 2. cap. 17.

An licentia personis concessa ad bona extendatur ?

Castellano, qui arcem dedit, securitas data est ut liceret abire; cum suis sociis, & cum suis bonis, quærebatur, an etiam foci cum suis bonis abire possent? Respondit Florianus Duci Carthaginensi, ab eo consultus, securitatem non extendi ad bona sociorum, propter possessivum Suis, quod dominium importat. Quæ opinio Gentili non placet, qui rogat, an sociis eundem sit. nudis, & si Castellano data licentia etiam rebus Castellani competat, cur non sociis data, competat etiam rebus sociorum? Illi itaque videtur verbum Cum suis bonis sic capiendum, Cum suis quæsq; bonis.

Vid. petri. Bellum part. 9. tit. 1. num. 24. Gentilem lib. 2. cap. 14.

An deditio partis pro sit reliquis ?

Cum urbs quædam ab Alexandro obsideretur, pars deditioem fecit, & portas urbis Alexandro aperuit. Curtius, ait, Alexandrum, aliis, etiam belli authoribus, pepercisse, quibus iure belli, merito irasci poterat, & Cortonenses uti narrat Jovius cum à Vastio Regis Hispani præfecto obsiderentur, vel nolente præfecto præfidii, se dederunt, quæ deditiois formula, ait, exeludebat præfidiarios, quos tamen Vastius pro humanitate dimisit, etsi armis exutos, quoniam potentis exercitus vim contempsisse videbantur. Si in commune consultum est, inquit Gentilis, quod sæpe contingit, cum obsessi dissentiant de oppido dedendo, aut de conditionibus deditiois, deditio facta à majori parte, ab omnibus facta habenda est, & omnibus proderit, etiam his, qui contra deditiois sententiam disceptarint, & egerint, sed & cum in commune consultum non est, si aliqui qui deditioem faciunt, pro aliis paciscantur istæ pactiones, etiam aliis proficient, ut alibi refert Jovius, sicut socius, pro socio contahere potest, cum inter eos causa est communis, maxime in actu necessario, & evidentis utilitatis, quanquam Si poena

pro deditione, à Principe imponenda esset, singuli qui dissenserunt, excusandi sint.

Vid. Gentilem lib. 2. cap. 17.

An missus ut de deditione ageret, conditionibus, eo absente, factis teneatur ?

Cum Aurantius pro Rege Averfam in Italia, quam Salassus Dux Regis Galliarum cum praesidio tenebat, obsideret, Guido Ranconus à Salasso ad Aurantium missus est, ut de deditione conditionibus, quam posset, honestis transigeret; Isq; diutius detineretur, & continuis tormentorum ictibus pars muri corruisset, Salassus militum precibus, & Averfanorum lachrymis fatigatus per alium idoneum hominem, ad arbitrium Aurantii deditionem fecit, quod cum Rancono innotuit protestatus est se æquo jure liberum esse, nec ratum habiturum conditiones, quarum beneficio uti nollet. Cumq; coram Vastio, alio Regis Hispaniarum Praefecto An Ranconus jure militiarum captivus habendus esset, disceptaretur, Vastius, inquit Jovius, lata super ea re mitiori sententia, ipsum liberavit. Quod etiam jure firmatur, affirmat Gentilis, si Is fuisset qui adhuc tueri oppidum, aut se potuisset. Quod etsi definitio plurium teneat, repugnantibus paucioribus, non tamen ea valet, quæ uno absente sit cujus praesentia potuit, in suam sententiam, ceteros trahere.

Vid. Gentilem lib. 2. cap. 17.

An Error circa Executionem deditionis ipsam irritam faciat ?

Valerius Ursinus, Hispanis sic se dederat, ut in castra Gallica, tuto deduceretur, Hispani postea captivum detinendum asserabant, hoc colore, quod Gallica castra, tum temporis nullibi erant, propter virtutem tamen viri, ipsum dimiserunt, uti refert Jovius; Gentilis vero etiam de justitia ipsum dimittendum fuisse affirmat, Quia summa pactionis erat pura, ne esset captivus, non sub conditione, si ullibi essent castra Gallica, De castris adjectum pro tuta executione pacti, quia in illis castris, Valerius tutus futurus erat,

rat, & quæ dicta sunt ad Executionem, ea non mutant de substantia. Itaq; Romani deditibus se Ætolis, & errantibus, in verbis formulæ deditiois, æquum putarunt statum pristinum restitui.

Vid. Gentilem lib. 2. cap. 17. Iovium lib. 25.

An deditos tanquam Proditores, Is cui deditio facta est punire possit?

Cum Præfidiarii, Præfectum qui deditioi consentire noluit, cepissent, atque in vincula coniecissent, atque ipsi de conditionibus deditiois pacti, se Solymanno dedidissent, Is iussit Præfectum honoribus affici, deditos autem omnes interfici. Sævam cædem inquit Jovius, immanis Imperatoris iussu factam, Aliqui non modo iuste, sed & ad laudem volunt, quando sacramentum militiæ non fuit violandum contra Præfectum, Sed tamen Præfidiarii diplomata libertatis obtinuerant, Abrupit igitur Solymannus suam fidem, dum perfidiam alienam ulciscitur. Quid nos, inquit, Gentilis? De perfidia illa Solymannus Iudex non erat, sed alius. Et dici tamen potest, quasi transfugas sic tractari eos à Solymanno potuisse, qui de eorum perfidia non noverat antea, cum fugerint ad Solymannum, contra Præfecti auctoritatem, & concludit Mihi opinio ista placet.

Vid. Iovium lib. 28. Gentilem lib. 2. cap. 17.

An fœdera vel sponsiones Pacis quæ à Ducibus fiunt, Principem, vel populum obligent?

Pactionem illam quam Sulpitius, Tribuus militum cum Gallis fecerat, de Obsidione ab iis relinquenda, Senatum ratam non habuisse testatur Livius, & Salustius de Pace inter Aulum Exercitus Romani Ducem, & Jugurtham Numidarum Regem, Senatus, inquit, uti par fuerat, Decrevit suo, atq; populi injussu, nullum potuisse fœdus fieri. Dubitatur tamen, si summa potestas sciverit, & tacuerit Quo casu distinguendum, an facta sit sponsio sub conditione, si rata haberetur à summa potestate, Nam hæc conditio facit

sponsionem nullam, an Sponsio purè facta sit, & tunc si silentio aliqui actus accesserint, qui ad aliam causam probabiliter referri nequeant, rectè intelligitur Sponsio rata habita; Si vero præter silentium, nihil accesserit, rata non habetur. Nam sine re, aut facto aliquo, silentium non satis probabilem voluntatis conjecturam supeditat.

Vid. Ayalam, lib. 1. cap. 7. nu. 5. Gentilem, lib. 2. cap. 10. Besoldum de Pace cap. 4. mi. 1. Grotium lib. 2. cap. 15. nu. 15, 16. &c.

An si Sponsio Ducis, summe potestati displiceat, ii quibus facta est, in eundem statum sive restituendi?

Cum de Pace Caudina in Senatu tractaretur, Spurius Posthumius, unus authorum Pacis, sententiam rogatus; Mea sententia, inquit, testis erit, Mihine, an Legionibus pepercerim, cum me, seu turpi, seu necessaria sponsione obstrinxi; quâ tamen, quando injussu Populi facta est, non tenetur populus Romanus, nec quicquam ex ea, præterquam corpora nostra, debetur Samnitibus. Dedamur per Fœciales, nudi, vinctique exolvamus Religionem populum, si qua obligavimus. Alii authores, L. Livius, & Quintus Melius, Tribuni plebis aiebant, Deditione sua populum non exolvi, nisi omnia Samnitibus, qualia apud Caudium fuissent, restituerentur. Idque Claudius Pontius, rex Samnitium, cum deditionem accipere, recusaret, contendebat, cum diceret. Populus Romanus, si Sponsionis factæ poeniteat, restituat Legiones intra saltum, quo septa fuerunt, recipiant arma, quæ per pacem reddiderunt, redeant in castra sua. Tribunorum, & Pontii sententiam æquitati congruere videri dicit Grotius; Posthumii autem usu probatum fuisse.

Vid. Livium, Decad. 1. lib. 9. Grotium, lib. 2. cap. 15. nu. 16.

An que Captivi paciscuntur, in libertate positi præstare teneantur?

Franciscus Rex Galliarum Pace Madriciana, Carolo Imperatori juratus promissit, se cum regni fines primum attigisset, Pacis conditiones ratum habiturum. In Curiam vero Parisiorum veniens,

ens, Senatum consuluit, ubi Selva Præses Curia, ad infirmendam pacem, Cardinalis Zabarella authoritate usus, & exemplo Iohannis Regis Cypri, qui à Genuensibus captus fidem non servavit, censuit, & suavit Quod vi, ac metu factum erat, ratum haberi non oportere; Quam opinionem miratur Bodinus, tanti Senatûs Principem, non erubuisse, tam ineptis argumentis munivisse. Cum revera pugnaret, non solum cum iudicio Romanorum, Attilii Reguli & Mancini Consulibus, sed & Francorum, qui Johannem Regem, ob fidem datam Regi Angliæ, cum captivus esset, quod ea quæ promiserat, efficere non posset, in Angliam redire permiserunt.

Vid. Bodinum, lib. 5. cap. ult. Hotomannum. Quæst. illustr. 7. Gentilem, lib. 2. c. 11.

An cum convenit in Pace, id alicui restituendum, quod ante bellum possedit, de bello incepto, an de bello renovato intelligendum sit?

IN Capitulis Pacis inter Principem Tridentinum, & Venetos, cautum est, ut sic quisque possideret, uti possidebat, ante proximum præsens bellum. Post principium belli, Princeps castrum occupaverat, post pactas inducias, renovato bello, castrum à Venetis est recuperatum. Quæsitum est, an Castrum ad Venetos ex pace spectaret? Alciatus respondit pro Principe, Quia proximum præsens bellum videtur, quod post inducias renovatum est: Malè vero eum respondisse censet Gentilius, quia idem fuit bellum, etsi à præliis per inducias cessatum sit, & itaque & proximum, & præsens, & ait non esse novum, quod est renovatum, sed vetus de novo repetitum.

Vid. Gentilem, lib. 2. cap. 12. Grotium lib. 3. cap. 20. §. 13 & 21. Eschthium de Fœderibus Thesi 21 ad finem. Questionem inter Imperatorem & Venetos de locis restituendis, Azusio contra Typinum disputat. Consil. l. 2. consil. 13.

Utrum

Utrum cum convenit, ut in Pace loca possiderentur, quæ in bello possidebantur, Pagi, & villa Oppidis vicina includantur?

Cum Galli in Pedemontana regione, loca quadam validis firmata prædiis, utpote Casalem, & Taurinum, quæ erant Civitates Metropolitanæ, possiderent; Cum Cæsariensis, & Subaudis conventum est, ut durantibus Induciis possiderent, sicut bello possederunt; unde Galli, idem jus in pagis, & in villis, quod in oppidis se habere contendebant; Quia loca erant oppidis vicina, ipsis belli tempore paruisent, in functionibus, & muneribus contulissent. Dicebat Petrinus Bellus, In acquisitione quæ fit jure gentium, naturale factum, magis quam civile inspicere debere, unde ad possessionem, realis, & plena apprehensio requiritur, neque invasione, vel acquisitione partis, sequitur acquisitio alterius partis non invasæ: Neque per præstationes, vel functiones occupatio, vel translatio possessionis acquiritur. Quia ejusmodi actus personas magis, quam loca afficiunt, & actus indifferentes, & promiscui non probant possessionem, nec jus Dominorum pendet à Subditis, qui possidentur inviti.

vid. Petrin. Bellum. part. 5. tit. 3. nu. 7. & DD. ab eo citatos.

Utrum cum convenit in Pace de locis captis restituendis, Oppidis quod antiquitus ad regnum capientis pertinnit, restitutio sit deneganda?

EX tractatu Cameracensi, Caletum à Gallis captum in bello cum Philippo Hispaniæ rege, & Maria Angliæ regina post annos octo reddendum erat, eo non reddito, Thomas Smithus in Galliam missus, more solenni coram Rege repetiit, Rex rem ad Consiliarios rejecit: Equibus Michael Hospitalius Cancellarius, in hanc sententiam differuit; Quo jure Angli repetunt Caletum, eodem etiam Lutetiam Parisiorum eos repetere posse, hanc enim, perinde atque illam, bello acquisiverunt, ac utrumque bello amiserunt; Anglos jus novum in Caletum prætere, Gallorum jus ipsi regno esse cœvum. Quamvis Angli 230. plus minus annos possederunt,

possederunt, jus tamen penes Galliarum reges fuisse, non minus quam Ducatum Aquitaniam, & Normanniam, quos Angli armis diu detinuerunt; Gallos Caletum, uti etiam Ducatus illos, non bello acquisivisse, verum recuperasse: Præscriptionem temporis inter Principes locum non habere, sed jus valere, & ex duodecim tabulis, adversus hostem æternam esse auctoritatem: Anglos in recenti tractatu Trecensi, Caleti ne quidem meminisse, ut agnoscere viderentur, se suo in Caletum jure omnino cessisse; In eo clausulam de reservationibus jurium, tantum minutiora respicere; hoc de Caletum inter potissima censendum. Ad hæc Smithus se non expectasse, ut tam obsoletum jus ad Caletum, ex profunda antiquitate repeteretur; Jam tandem autem perspicere, quicquid Galli, quo jure, quâve injuria in possessionem semel attraxerint, id pro suo jure deputare, tanquam jus iis esset solum in armis, & nihil interesset bona, an mala fide possideant, Gallos existimare se Caletum Postliminii jure tenere, quod ex Conventionem tenent, & apud animum statuere, pactam de Caletum restituendo fidem, neutiquam præstare. In tractatu Trecensi vendicatum non fuisse, octennio tunc temporis non exacto, & hic assurgens ad Galliarum Consiliarios conversus, vestram, inquit, fidem, qui adfuitis appello, cum nos jus nostrum ad Caletum disertis verbis reservandum urgeremus, vos omittendum, quia tempus nondum venerat: Annon tunc inter nos convenerit, ut reservaretur, sub illa clausula, omnes aliarum petitiones salva, & integra manebunt?

Vid. Camdenum, anno 1567.

Utrum cum convenit, de Bonis, vel eorum valore restituendis, sufficiat, (cum bona quæ extant vindicantur) valorem eorum offerre?

Cum inter Societates mercatorum Angliæ, & Belgicæ in partibus Indiæ Orientalis, negotiantes, multa damna hinc inde hostiliter illata fuissent, tandem conventum est, ut utriusque ab injuriis, & damnis inferendis abstineretur: Et ut cum naves, tum bona, vel eorum valor, quæ à tempore initæ conventionis, usque ad publicationem ejusdem in iis partibus, caperentur,

tur, hinc inde restituèrentur Virtute hujus conventionis Mercatores Societatis Angliæ restitutionem bonorum perunt, quæ post initam conventionem capta sunt, & in Hollandiam deducta: Delegati ex parte Societatis mercatorum Belgicæ, restitutionem non deberi contendunt, nisi in partibus Indiæ, ubi bona capta sunt, nec ipsorum bonorum, sed valoris, quanti fuit cum caperentur. Ex parte Societatis mercatorum Angliæ respondebatur, Ubi conventum est simpliciter de restituendo, ubicunque bona capta reperta sunt, peti posse, quia Debitorum interest, qui solvere tenentur, loca & tempora designare, alioquin ubicunque, & quolibet tempore, creditores exigendi jus habere: Ad valorem quod attinet, de jure communi, bona, si extent, in specie restituenda esse, & in Conventione, in qua nihil in contrarium cautum fuit, idem observandum; Cum post conventionem factam bona illicitè capta haberentur, nec eorum proprietas à prioribus Dominis ullo juris titulo translata fuisset.

Vid. L. 10, 11, 12. D. de rei vindicatione, 168. & 75. D. de verb. signif.

Utrum Bonorum, quæ casu fortuito, quem præcessit incuria, perierunt, pretium sit restituendum?

E Adem conventionem inter Societates mercatorum Angliæ. & Belgicæ pactum est, Quod naves utrinque captæ restituerentur, eadem conditione qua in possessione capientium reperirentur, Ad restitutionem vero navium quæ periissent, neutra pars teneretur, nisi in servitio partis periissent, Et quod Bona restitutioni subjicerentur quæ ad partem alterutram in effectu pervenissent. Ex hac conventionem Hollandi, cum navis eorum mercibus onusta, ab Anglis capta fuisset, & per aliquot dies ab Anglis possessa nautarum quorundam culpa, vel incuria, una cum mercibus deflagrasset, pretii sive valoris navis, & mercium restitutionem petierunt. Quod navis ab Anglis possessa, in eorum servitio haberetur, & quod damnum quod culpa Anglorum contigerat, ipsis, non Hollandis incumbere deberet. Ex parte Anglorum referebatur, Navem in eorum possessione, sed non in servitio, nec occasione servitii, (quod in conventionem intelligi debet) periisse. Nec casum fortuitum, qui culpâ,

culpâ, vel incuria nautarum contigit, societati mercatorum Anglorum imputandum, cum ab iis eadem diligentia in ea nave tuenda adhibita sit, quâ in navibus suis & idem infortunium contingere potuerit, si navis in Hollandorum possessione permanisset; Nedum eos teneri de valore bonorum restituendo, quod bona, cum nave incendio absumpta, ad eos in effectum, vel cum effectu non pervenerunt, Nam, prout Jureconsulti definiunt, tunc quid cum effectu ad aliquem pervenisse intelligendum est, quando ex eo locupletior factus est.

Vid Pet Fabrum ad 1. Contractus. D de reg juris l. 11. D de peric. & com. ad rei venditæ l. 71. D de verb fig. 120. D de petit. Hereditatis.

An qui Civitatem salvam fore promiserunt urbem destruere possint?

Cum Pœni, post tertium Bellum Punicum, Romanorum socios bello lacessivissent, & finitimos populos ad defectionem invitassent. In Senatu Romano de Carthagine delenda consulebatur, De quo famâ pervulgatâ, Carthaginenses Legatos Romam miserunt, qui orabant, ne urbem rerum ante gestarum gloria clarissimam, ac Romanorum illustrium victoriarum monumentum deleant, Legatis à Consulibus denuntiatum est, ut in fide Senatus, populi que Romani permanerent, Obsidibus trecentis, ac navibus populo Romano datis, Civitatem Carthaginensem salvam fore, eosque jura, privilegia, immunitates, easdem habituros, quibus antea semper usi fuissent; Legati, accepto responso, lati domum redierunt, Mox Scipio Africanus junior, accepta classe maturè proficisci jubetur, & urbem ferro, flammâque delere; Scipio secundum mandata, Censorinum Legatum mittit, qui posteaquam, Obsides una cum navibus recepisset, populum universum, excedere ex urbe iussit, sic tamen, ut quæcunque vellet, exportare, urbemque à portu remotiorem condere liceret, Carthaginenses imperio Ducis perterrefacti, ad fidem Senatus, populi que Romani provocant: Quibus responsum est Populum Romanum, ea quæ Legatis promissa, præstitisse, Civitatem vero manibus urbis minime contineri. Ita etiam Pompeius, cum ducentos Senatores, ac meliorem

Civium partem, ab urbe, quam Cæsari reliquisset, seduxisset, dicebat non in parietibus esse rempublicam. Modestinus vero Jureconsultus, ait, Si aratrum in Civitatem inducatur, ut passa est Carthago, Civitas esse definit; Certe non est eadem Civitas, quæ, ne deleteretur Legati orabant, & cujus salutis expectatione Obsides, & naves à Carthaginienfibus tradebantur. Et Gentilis ait, Etsi sit differentia Urbis, & Civitatis, quod urbs ædificia, Civitas incolæ sint, tamen est interpretatio omnis sinistra, & extranea quæ auribus vulgi non consonat: Nec civitas sine urbe, ædificiis, & mœnibus est, in quibus multa Civitatis ratio est, & addit quod in pluribus tertii belli Punici, Romani defendi vix possunt.

Vid. Livium, 5. Decad. ult. Diodorum, lib. 41. D. Quibus modis usufructus amittatur, l. 21. Bodinum, lib. 1. cap. 6. Gentilem, lib. 2. cap. 4. Grotium, lib. 2. cap. 16. §. 15.

An provocato, pacto Pacis contravenire liceat?

Martius Legatus Romanorum, Perseo Regi Macedoniæ, qui fœdus cum Philippo patre initum renovarat, objecit, quod Abripolim Amicum atque Socium populi Romani regno expulisset: Cui respondit Perseus, Si est in fœdere ita scriptum, ut, ne si bellum quidem quis inferat, tueri me, regnumque meum liceat, mihi fatendum est fœdus violatum esse, quod me adversus Abripolim Socium populi Romani defenderim. Sin autem jure gentium, ita comparatum sit, ut arma armis propulsentur, quid tandem facere me decuit, cum Abripolis regni mei fines pervastâset, multa libera capita, magnam vim Mancipiorum, multa millia pecorum abegisset. Pactum pacis, inquit Grotius, admittit, ut si nova causa subfit, vis bellica inferatur, quæ si probabiliter afferri potest, satius est injustitiam sine perfidia, quam cum perfidia admissam credi. Et Thucydides, Pacem rumpunt, inquit, non qui vim vi arcent, sed qui priores vim inferunt.

Vid. Livium Decad. 5. lib. 2. Grotium, lib. 3 cap. 10. §. 28. Gentilem, lib. 3. cap. 24

An

An Obsides dati liberent à fide iurejurando præstita?

Bodinus Franciscum Gallorum Regem, fœderis Madritiani religionem solum asserit, quod filios Obsides dedisset: Obsides autem, inquit Ayala, quemadmodum fidejussores, & pignora, principali Obligationi accedunt, quo diligentius cautum sit Adversario, & tantum abest, ut principalem obligationem tollant, ut sine eo consistere nequeant: Itaque Johannes Rex Gallorum, in prælio ab Anglis captus, & dimissus, fide data de revertendo, si minus pacta implerentur; tametsi, & ipse filium Obsidem dedisset, ad hostem redire maluit, quam fidem datam violare.

Vid. Bodinum, lib. 5. cap. ult. Ayalam, lib. 1. cap. 6 nu. 5. Gentilem, l. 2. cap. 11. in fine.

An Obses detineri possit, mortuo eo, pro quo datus est?

Demetrius, qui pro Antiocho fratre Romæ Obses erat, cognita ejus morte Senatū adiit; Obsidem inquires, se vivo fratre venisse, eo mortuo cujus Obses sit, se ignorare: Dimitti igitur se ad regnum petendum æquum esse, quod sicuti jure gentium majori fratri cesserit; ita nunc sibi, qui ætate pupillum antecederet pupillus cedere debeat. Cum vero se non dimitti animadverteret à Senatu, tacito judicio tutius apud pupillum, quam apud eum regnum futurum arbitrans, specie venandi ab urbe profectus Hostiam, tacitus cum fugæ Comitibus navem conscendit. Gentilis ait per leges civiles fidejussorē liberari qui sponduit Titium non facturum eo mortuo; Alios autem distinguere, an dictum sit Titium regem Syriæ non facturum, quo casu liberatur fidejussor, moriente Titio, an ita, Syriæ Regem Titium non facturum, quo casu fidejussor non liberatur, quasi in priori adjectum sit de rege ad ostendendum, qui ille sit Titius, in posteriori de Titio ad ostendendum Regem qui tunc est. Ipse vero non definit an hujus generis distinctionum iuræ civilis, in hujusmodi juris gentium negotiis lo-

cum habeant. Censet tamen quod aliquando persona pacto in-
itur, non ut personale pactum fiat, sed ut demonstretur, cum quo
pactum est, ut, cum res etiam ad successorem pertinet: Et è con-
tra, etiamsi nomen proprium usurpatum non sit, personam tamen
respicere, ut cum factum est compromissum in Regem, quo extin-
cto, conventio de compromisso extincta habenda est.

*Id. Iustinum, lib. 34. Gentilem, l. 1. cap. 19. Grotium, lib. 3. cap. 20.
§ 57.*

An qui dederunt Obsides, fugientes recipere possint?

Cum Romani Porſenæ regi Hetruriæ de fœdere pacis Obsides
dedissent, Clælia virgo una ex Obsidibus, cum castra Hetruf-
corum, forte haud procul à ripa Tyberis locata essent, fru-
strata custodes, Dux agminis virginum, inter tela hostium Sy-
berim tranavit, sospitesq; omnes Romam ad propinquos restituit;
quod ubi Regi innotuit Oratores Romam mittit, ad Clæliam Ob-
sidem deposcendam, alias haud magni facere, & præ se ferre, si
Obses non dedatur, pro rupto fœdere habiturum, sic deditam invo-
latam ad suos remissurum, utrinque, inquit Livius, constitit fides,
& Romani pignus pacis ex fœdere restituerunt, & apud Regem
Hetruscum non solum tuta, sed honorata Clæliæ virtus fuit; Nam
virginem parte obsidum, qui manserant, donavit, & quos vellet,
eligere permisit. Illa, productis omnibus, impuberes elegit, quod
& virginitati decorum, & eam ætatem ab hoste liberandam cense-
ret, quæ maximis opportuna injuriis esset. Bodinus ait, quod semper
licuit obsides fugientes necare, etiamsi expressum pactis de hoc
non esset: Et sic Tarentini, qui fugere tentarunt, retracti Romam,
virgis cæsi, & de saxo dejecti sunt. Gentilis idem jus esse dicit, quia,
Obsides non sunt captivi, quibus fugere licet; Obsides enim dati
sunt ex conventionem, quam non licet fallere. At Grotius, constat
inquit Obsidi fugere non licere, si ab initio, aut postea, quo laxius
haberetur, fidem dederit: Alioquin videtur non is animus fuisse
civitatis, obligandi civem, ne aufugeret, sed dandi hosti facultatem
qualis vellet custodiæ, & sic ait defendi potest Clæliæ factum; Gentilis
vero, & Grotius ambo concludunt, civitatem quæ dedit, Obsidem
recipere,

recipere, & retinere non debere, non magis quam recipere rem datam pignori citra furti crimen, & proinde Edvardus tertius Rex Angliæ Gallum iuste accusabat, quod contra jus obsidem fugientem recepisset.

Vid. Livium, lib. 2. Gentilem, lib. 2. cap. 19. Grotium, lib. 2. cap. 20. §. 54.

S E C T. X.

*De Quæstionibus Delicti inter eos
quibuscum Bellum est.*

Quæstiones de Delicto inter eos quibuscum bellum est, sunt, in quibus queritur, An id præstium sit quod oportuit, in inchoatione, & prosecutione belli, nec non in executione post partam victoriam.

1. *An bellum aliquando omiſſa indiſtione movere liceat?*

Cum Gustavus Adolphus Rex Sueciæ Germaniam cum exercitu invaſiſſet, Ferdinandus ſecundus Imperator datis ad eum literis, ſcripſit, Vehementer ſe mirari, quod tanto cum exercitu Romanum imperium invaſiſſet, & bello non indiſto, tantas turbas excitaveſſet: Quibus Reſpondet Rex, Se non arbitrari, fieri poſſe, ut præteriti temporis acta Imperatori tam cito exciderent; Ejus caſtrorum Præfectum, abſque ulla belli denuntiatione integrum, & potentem exercitum, ſub ſignis Aquilarum in Boruſſiam duxiſſe, toti orbi cognitum, ac perſpectum eſſe; quare ſe proſpicere non poſſe, quo prætextu denuntiatione belli, quam ipſe oblitus erat, à ſe qui bellum non intulit, ſed repulit, poſtularer; ſibi ve imputare queat, quod contra omnium gentium jura egerit: Neque enim jura illa exigunt, ut vis injuſta, quæ alteri inferitur, per foeciales propulſetur, cum natura, & res ipſa, unicuique arma ad ſalutem, in hujusmodi caſu expediendam concedat: Neque tamen belli denuntiationem, ſe proſus omiſſiſſe, quin potius, ſedulo caviſſe,

cavisse, ne quis se, præter opinionem armis oppressum fuisse, conqueri posset. Nam binis ad Electores literis, & regni sui Consiliario, ad Generalem ipsius misso, disertè testatum fuisse; nisi illata sibi injuria sarciretur, se tandem post æquissimas suas querelas, aliam viam, se, suamque dignitatem tuendi, initurum. De hac vero quaestione Jureconsulti ita statuunt, Sicut citatio in foro civili, ita in bello denuntiatio aliquando ex justâ causâ omitti potest. Utpote, 1°. Cum suscipitur bellum ex causâ necessariâ defensionis. 2°. Cum his bellum infertur, qui jam hostes habentur. 3°. Cum contra rebelles, & defectores arma sumuntur, quia cum illis jus gentium non observatur; ita Campanis & Fidenatibus defectoribus, Romani bellum non denuntiarunt. 4°. Fœciales tradunt, non opus esse amicitia renuntiare, cum Legatis res repetentibus, eæ nec redditæ sunt; nec sit aliter satisfactum; Similiter apud Dionem, Cæsar disserit, ad movendum Ariovisto bellum, absque Senatus, & populi decreto; Qui ait, obstringere bella ad quæ parari homines possint, & querelæ, & Indictiones præire, sed alia exorire, quæ tanquam jusserit necessitas non possunt in disceptationem adduci.

Vid. Arma Suecica. p. 54. Gentilem, lib. 2. c. 2.

2. *An post Denuntiationem bellum statim movere liceat?*

Petrinus Bellus ingenuè fatetur, se nullibi statos dies inferendi belli post indictionem comperisse. Ait tamen naturali ratione æquum esse, ut aliquod temporis intercedat, quo quis se præmuniat, & defensioni præparet, alias doli accusari potest, qui eodem fere momento bellum indicit, & aggreditur, quamvis paratum se præstare oportet, qui sibi bellum indicendi causam præbuit. Maxime si sit causa recens, ardua, & inexcusabilis. Gentilis tradit, Post indictum bellum, expectari adhuc solitum dies tres, & triginta, antequam gereretur. Et fortassis quod de triduo mentionem facit, originem duxit à Constitutione Imperiali, quæ habetur apud Guidonem Papæ, & male egisse Cyrum ait, qui Armenio Regi simul intulit & indixit bellum, & Romanos malè, qui tertium bellum Punicum, momento indictum, & illatum sic gesserunt, & itaque

itaque Episcopum quendam Chosroi Regi Persarum rectè dixisse, facere ipsum indignè, qui nullum tempus Justiniano tribueret ad deliberandum, ut, vel de pace inter se convenient, vel bellum ex condicto gererent. Grotius vero affirmat, jure gentium nullum tempus post indictionem requiri, nec Cyrum aut Romanos reprehendit, Agnoscit tamen posse contingere, ut ex naturali ratione tempus aliquod intercedat, pro negotii qualitate, puta cum res repetitæ sunt, aut pœna in nocentem postulata, & id negatum non est, Tunc enim dandum est tempus, quo id quod petatum est commodè præstari possit.

*Vid. Perrinum Bellum part. 2. c. 8. nu. 9. Gentilem lib. 2. cap. 1. in fine.
Grotium lib. 3. cap. 3. §. 13.*

3. *An in bello Dolo uti liceat?*

Cum Darius Babyloniam obsedisset, difficilisque esset urbis expugnatio æstuante Rege, Zopyrus, nasum, labia, & aures sibi præcidi fecit, & transfugæ titulo Babyloniam proficiscitur, & populo ostendit laniatum corpus, de crudelitate Darii querens, & hortatur, ut patiantur, se commune bellum recentiori ira gerere, Nota nobilitas viri, pariter & virtus omnibus erat, nec de fide timebant, cujus veluti pignora, vulnera corporis habebant, constituitur ergo Dux omnium suffragio, & accepta parva manu, semel atque iterum cedentibus ultro Persis, secunda prælia fecit, ad postremum universum exercitum sibi commissum Regi prodidit, urbemque ipsam in potestatem ejus redegit. Livius vero claros magis, quam honestos esse ait, qui talia Zopiri admiserint in corpus suum, ac fraudes transfugiorum, artes esse minime Romanas, & Messala parum honestam rem subverebatur, quod Menedorus proditurus Pompeii classē, petebat, ut aliquantisper sibi liceret infestare classem Cæsaris. Polybius vero asserit quæ vi fiunt in bello minoris esse, quam quæ ex occasione, & dolo geruntur, ac Ammianus dicit, nullo discrimine virtutis, ac doli prosperos omnes laudari bellorum eventus, & Jurisconsulti bonum dolum vocant, quem adversus hostem quis machinatur. Gentilis postquam auctoritates in contrarium recensuit, concludit, Quod mirum videri possit. Respondeo juste eos agere,

& qui transfugiunt, & qui transfugas mittunt. Grotius huc etiam refert actus eorum, qui hostium armis, signis, vestibus, velis utuntur. Hæc enim omnia ejus generis sunt, ut à quovis pro arbitrio usurpari possunt.

Vid. Iustinum lib. 1. in fine Gentilem lib. 2. cap. 2. & 2. Et Grotium lib. 3. cap. 1. §. 6 & seq.

4. *An apud Hostes falsiloquio uti liceat?*

Themistocles cum vereretur, ne post victoriam Atheniensium navalem, Xerxes adhuc in Græcia subsisteret, atque in novas angustias Græcos induceret, simulata amicitia Xerxen monet, ut festinaret abire è Græcia, antequam exitus ipsi, à Græcis intercideretur; & Ventidius cum exploratores Parthorum nosset, qui ad se transfugæ videri volebant, humaniter tanquã amicos tractans, sinebat se ab illis audiri, quod facturus quid foret, quando aliud cogitabat, ut illi de perceptis quasi consiliis Parthos facerent certiores, qui ad nuntiata pararent se, & ut imparati offenderentur, ubi ipse eos invadere constituisset. Themistocles Hosti, Ventidio contra hostem falsiloquio sive mendacio usus est. Augustinus tamen negat unquam justum esse mendacium etsi Hostis per illud fallatur, qui alias justè fallitur, sed Regulæ de non mentiendo, Exceptionem, Nisi adversus hostes, addit Plato, Zenophon, Philo. inter Judæos, inter Christianos Chrysostomus, & Theologi, præter Augustinum ferè omnes, quod & Gentilis, & Grotius probant. Monent tamen quod de falsiloquio dictum est, ad asserentem sermonem, non ad promittentem referendum. Nam ex promissione jus confertur ei, cui fit promissio, idque etiam inter hostes locum habet.

Vid. Plutarch. Themistoclem. Dioni lib. 49. Gentilem lib. 2. cap. 5. Grotium lib. 3. cap. 1. §. 17. & 18.

5. *An veneno hostes tollere liceat?*

Cum Perseus cum Tarentino quodam egisset, ut Romanos veneno tolleretur. Livius ait eum non justum bellum animo regio sed per clandestina scelera latrociniorum, ac veneficiorum grafsatum

gratatum esse. Baldus vero tradit licitum esse hostem veneno occidere, prout docet Vegetius, & quod ad defensionem vetitis armis uti permissum, cum nihil sit illaudabile in via defensionis. De Vegetii autoritate dubitat Gentilis, & siquid ejusmodi tradat id in stratagemmatibus opinatur, quæ jus non faciunt. Et manifeste falsum ait, quod in Bello defensivo permitti traditur, Quia defensio debet esse inculpata. In contrarium affert L. Flori auctoritatem, qui scribit cum Aquilius Asiatici belli reliquias confecit, mixto veneno fontibus, ad deditionem quarundam urbium. Ea res ut maturam, ita infamem fecit victoriam, quippe cum contra fas Deum, moresq; majorum, medicaminibus impuris, in id tempus sacrosancta arma Romana, violasset. Hujus etiam criminis arguit Hispanos, qui Neapoli obsessi à Gallis, nocte egredientes puteos hosti venenabant, & gnari morbi, antea Neapolitani, postea Gallici nuncupati, & contagionis ejusdem, clam scorta, & ea formosissima ex urbe miserunt, à quibus Gallicus exercitus inficeretur. Grotius autem censet, non idem statuendum, de aquis sine veneno corrumpendis: ut bibi nequeant. Id enim perinde habetur, ac si avertatur flumen, aut fontis venæ interceptantur, quod & natura, & consensu gentium licitum est.

Id. Gentilem lib. 2. cap. 4. Grotium lib. 3. cap. 4. §. 15.

6. *An Hostem immisso percussore interficere liceat ?*

Cum Porfena Rex Hetruscorum, studio Tarquinius Romam reducendi, urbis faucibus incubaret, Mucius Scævola Regem per insidias in castris ipsius aggreditur, ibi, cum stipendium fortè militibus daretur, & scriba cum Rege sedens pari fere ornatu, multa ageret, eumq; milites vulgo adirent, Mutius Scribam, pro Rege interfecit, & cum frustrato circa purpuratum ictu, teneretur, ardentibus focis injecit manum, terroremq; geminat dolo, ut scias inquit quem virum effugeris, idem ttecenti juravimus, unde Rex territus, Romanos liberos esse jussit. De quo factò Seneca. Facere aliquid in illis castris foelicius potuit, nihil fortius. Alius Romanus, in prælio simulans se unum ex militibus Mithridatis, prope congressus, tanquam quippiam ei dicere cupiens, Regi vulnus intulit &

quamplura ejusmodi exempla Gentilis recitat; nec probat tamen, sed justam censet Alexandri magni querelam de nece Patris, per Darii procuracionem perpetrata: Cum habeatis arma licitamini hostium capita. Laudatq;, quod ejusdem Darii necem parricidiale immuni supplicio ultus est. De facto Scævola aliter censet Grotius, in quo ipse Porfena nihil agnovit, nisi virtutis. Distinguit tamen inter eos qui cum talia aggrediuntur, nullo fidei vinculo astringuntur, ut subditi in regem, vassali in Dominum, Milites in eum cui militant. At de his percussoribus quorum facto perfidia inest, aliter censendum ait, Neque enim ipsi tantum contra jus gentium faciunt, sed & qui eorum opera utuntur.

Vid. Gentilem, lib. 2. cap. 8. Grotium, lib. 3. cap. 4. nu. 18.

7. *An hostium superstitione ad eorum periculum abuti liceat?*

Philippus Macedoniæ Rex milites suos pugnatueros contra Phocenses Lauro coronavit, quod Phocenses templum Apollinis spoliassent, & itaque ad aspectum frondis ejus Dei terrerentur, quod evenit; Nam terga illico obverterunt, & cæsi incruentam regi victoriam tradiderunt. Sic captum in Epiro oppidum inexpugnabile perhibetur, cum proditor illic merisset in puteo, qui solus potum præbebat, canem, quod Præfidiarii milites Græcæ superstitioni addicti, citius morituros, quam de aqua contaminata morituros, se contenderent. Gentilis ait, Superstitione Hostium abuti cur non liceat nulla causa est. Arbitri vero in gallorum præliis, gallum capite mulcare solent, qui alio infectus est, ut alter gallus per foetorem ex arena plofigari videatur. Et Duelli Legibus, quæ virtuti, & honori maxime prospiciunt, improbum habetur, si quis dimicaturus sub veste exteriori, clâm tunica loricata induatur quô adversarii ictus irriti, & inanes reddantur.

Vid. Gentilem, lib. 2. cap. 2. Zonaram, tom. 2. Scander. 5.

8. *An Jus talionis inter hostes locum habeat?*

Cum ingenti Pœnorum classe circa Siciliam devicta, Duces ejus fractis animis, consilia petendæ pacis agitent, & Amilcar ire se ad Consules audere negaret; ne eodem modo catenæ sibi injicerentur, quo ab ipsis Cornelio Asinæ Consûli, injectæ fuissent, & Auno certior Romani animi æstimator, nihil tale timendum ratus, magna cum fiducia ad eorum colloquium tenderet, cum de Belli fine ageret, Tribunus militum dixit, posse illi merito evenire, quod Cornelio Asinæ accidisset; uterque vero Consul Tribuno tacere jussu, isto metu inquirunt, Auno, fides nostræ Civitatis te liberat; Claros inquit Valerius Maximus, fecit tantum hostem vincere potuisse, sed multo clariores, noluisse. Gentilis vero inter hostes jus talionis licitum esse videtur defendere, & ait Romani juste captos virgis cædunt, & securi feriunt, quod sui ab hostibus capti immolati fuissent, & filiis Reguli nobilissimos Pœnorum captivos dederunt trucidandos, perdendosq; in Patris vindictam, qui Carthagine sævissima morte interfectus fuit: Idem narrat, tractatos à Florentino pessime, etiam suspensos Hispanos, quoniam Florentini alibi pessimè tractati ab Hispanis fuissent. Quod refert Jovius, & affirmat, Non hic dici valere, Se non illos esse, qui crudeliter egerint, ideoq; crudeliter tractandos non esse. Nam unum corpus est exercitus, nnum corpus sunt hostes, unum corpus sunt qui ab una parte bellum faciunt. Contra Grotius, ait, Talionem naturam non admittere, nisi in ipsos qui deliquerunt, nec sufficere, quod hostium unum quasi corpus, factione quâdam intelligas, quia singuli qui non consenserunt malo, afficiendi non sunt ob delictum universitatis; unde Plutarchus Syracusanos hoc nomine accusat, quod Hicetæ uxores, & liberos occiderint; ideo tantum quod Hicetas Dionis uxorem, sororem & filium interfecisset.

Vid. Valerium Maximum, lib. 6. cap. 6. Gentilem, lib. 2. cap. 18. Grotium, lib. 3. cap. 11. §. 16. & l. 2. c. 21. §. 18.

9. *An in deditos, qui inutili defensione hosti negotium facefferunt, favire liceat?*

Henicus secundus Rex Galliarum captis Bovinis, nonnullos nimium obstinatos, suspendi iussit, quia contra militarem disciplinam, conati essent locum debilem, quem nullo pacto tueri poterant, contra copias regias propugnare. Et Jovius refert, quosdam, deditos arbitrio victoris, quod loca immunita, pertinaciter retinere voluerint, turpi morte affectos: Neapolitanus vero respondit Belisario, Pertinax studium in aliquem, nemo iudicet dignum supplicio; Et considerandum quod non absque certissimo capitis periculo, quis possit locum assignatum deferere, aut statione, vel praesidio decedere. Gentilis ait, milites in huiusmodi casibus obstinatos, excusari posse, at ab omni culpa nequaquam liberari, quia ad impossibilia non tenebantur, nec considerandum, quod miles male metuat à suo Principe, cum iniustitia aliena, non debet hosti esse incommodo.

Vid. Gentilem lib. 1. cap. 16. Grotium, lib. 3. cap. 4. §. 13.

10. *An eos qui de deditione agentes, interim munitiones parant, & hostilia agunt Severius tractare liceat?*

Regio per vim à Ferdinando recepta, Galli omnes de manibus praecipitati sunt; quod, ut captas munitiones perficerent, de deditione simulato egissent, crebrisque colloquiis Regem diu ludificati erant, & quosdam etiam milites ante mania tormentis interfecissent. In eos, inquit Gentilis, qui deditionem omnino pepigerunt, & non praestiterunt, merito aliquando favitum est, ut, cum Praesidarii pepigissent Franco, Perpinianum intra triduum dedere, mox de auxilio suis subvenientibus indicant, quod cum Francus cognovit, & fraudem sensit petiti tridui, vi oppidum adoritur, expugnat, faminasque & impuberes caedit: Cum vero de deditione conventum non est, indignè, inquit, Galli eo supplicio à Ferdinando affecti sunt, quoniam tractatus ad nihil astringit; nec quicquam est, quod vetet simulare, & per dolum rebus suis deferre.

vire. Cædi incautorum militum, aliquid dandum videbatur, sed nec ob hanc Ferdinandus excusandus. Cur enim illi ad mania? Si nihil perfidiæ intervenit sæviendi causa non erat.

Vid. Gentilem, lib. 2. cap. 18.

11. *An cum hoste, qui se dedit, infido & inconstanti, severius agi possit?*

Cum Campsani se Mario dedidissent, eorum oppidum incensum, puberes interfectos, alios venditos, prædamq; militibus divisam, Salustius refert, Quod facinus, inquit, contra jus belli, non avaritia, neque scelere Consulis admissum, sed quia locus Jugurthæ opportunus; Romanis aditu difficilis; genus hominum mobile, & infidum, ante neque beneficio, neque metu coercitum; Gentilis contra jura belli, ordinaria, factum dicit, à jure tamen singulari, & extraordinario sustineri posse, atque ita Cæsarem, non Numidis, non Jubæ, qui se dederunt pepercisse, & sævè aliquando Gallos tractasse, ut genti, ad omnia consilia mobili, terribilis exempli notam inureret.

Vid. Gentilem lib. 2. cap. 18.

12. *An captos qui coerceri non possunt, interficere liceat?*

Angli in nobili illa pugna; Regis Henrici quinti auspiciis ad Agincurtum commissa; quâ Gallicum imperium pessum dederunt, cum plures captos haberent, quam ipsi victores, veriti nocturna pericula, selectis nobilioribus, cæteros trucidârunt, factum inhumanum, inquit historia; nec tam cruentum Prælium, quam victoria fuit, Gentilis inquit, se laudare non posse. Laudat vero Scotos, qui licet maximum periculum immineret, captivos non necarunt, & Galliæ Ducem, qui ut multitudine captivorum castra exoneraret, generosè dimisit omnes: Quærit tamen, annon causæ sint singulares, propter quas captivi occiduntur? & refert, Annibalem, à Fabio circumventum, ne quid imminente periculo tumultus esset à captivis, eos omnes qui erant quinque millia cæcidisse,

disse, & Centum captivos, cum in prælium processurus erat necasse, quia neque fidere potuit iis, nec eos custodire.

Vid. Gentilem, lib. 2. cap. 16.

13. *An bis captis parcendum sit?*

Ligarius à Cæsare captus, dimittendus fidem dedit, se postea contra Cæsarem nihil moliturum, quod cum non præstitisset, & iterum in manus Cæsaris devenisset, propter ingratitude, & perfidiam interfectus est. Et plures iterum captos idem interfecit, stultitiæ deputans, servare eos, qui non semel adversati essent. Cæterum, ait Gentilis, hoc præcipue obtinet in mercenariis, nam ut civis vel millies captus, asperius tractari possit, nulla causa est; Neque enim non tueri patriam, aut Principi suo non parere, quisquam obligari potest.

Vid. Gentilem, lib. 2. cap. 18.

13. *An Obsides, ob delictum eorum à quibus dati sunt, interimere liceat?*

THraces interfecerunt aliquando Obsides ducentos quinquaginta, Romani Volscos, Auruncos, trecentos: At Narseti, bono Duci atrox visum est, de innoxiiis Obsidibus supplicium fumere; & Scipio aiebat, Se non in Obsides innoxios, sed in eos qui defecissent, sæviturum, nec ab inermi, sed ab armato hoste pœnas expetiturum; Si vero qui Obses venit, est, aut ante fuit, in numero delinquentium, aut post fidem à se datam, in re magna fefellit, fieri potest, ut supplicium injuria vacet; ita Grotius: Gentilis vero, ait, Etsi nihil peccarunt, justum est, & expedit, ut Obsides puniantur, sic enim, Fides rerum pretiosissima asseritur, & jus militiæ delicatissimum conservatur, argumento, quod pœna est ex Conventionione, & ergo justa, sicuti, si ex culpa venisset, aut peccato: Grotius ait, ita obtinuisse, cum vulgo crederetur, quemque in vitam suam id jus habere, quod in res alias, atque id jus consensu tacito, aut expresso pervenisse ad Civitatem: At postquam

quam innotuit, Dominium in vitam, Deo exceptum, creditum est. neminem posse, ex pacto, vel conventionem, jus cuiquam dare ad vitam, aut suam, aut Civis sui.

Vid. Gentilem lib. 2. cap. 19. Grotium lib. 3. cap. 4. § 14. & cap. 11. § 18.

15. *An infamias & pueros bello victos sœvire liceat?*

THraces capta Mycaleffo, fœminas quoque, & infantes occiderunt, narrante Thucidide, Idem de Macedonibus, cum Thebas cepissent, narrat Arrianus, & Germanicus Cæsar, ut refert Tacitus, cum vicos Marforum qui Germania populus erant, vastavit, non sexus, non ætas moderationem attulit. Grypus vero apud Justinum, à nullo unquam majorum suorum, inter tot domestica, & externa bella post victoriam in fœminas sœvitum, quas sœvus ipse & periculis bellorum, & sœvitia victorum eximit: Exempla in contrarium, vel ad ulciscendum gravem cladem suorum, vel ad gravia facinora puniendum referuntur.

Vid. Gentilem lib. 2. cap. 21. Grotium lib. 3. cap. 4. § 9 & lib. 3. cap. 10. § 10.

16. *An fœminis, quæ armata virorum munia obierunt, sit parcendum?*

Aurelianus Imperator mulieres, quas virili habitu pugnantes accepit, multas cecidit, alias in triumphum duxit, Gentilis non parcendum ait Amazonibus, quales fuerunt, Artemisia, Zenobia, Victoria, mater castrorum cognominata, non furialibus illis, quæ ad Monam insulam Suetonio Paulino occurrerunt, non magis quam viro ulli. At Spartani ab Argis oppugnandis abstinuerunt, quia in defensione mulieres erant, quas lædere ignominiosum arbitrabantur, Gentilis respondet, in eo quod viros agunt, non sunt fœminæ; aliter facile esset contra hostes tueri omnia, positis fœminis, custodibus, & defensoribus, atq; Spartanos verius ab oppugnatione abstinuisse, quia ignominiosum fuisset, quod metuebant, à fœminis repelli.

Vid. Gentilem lib. 2. cap. 21.

17. *An stupra in fœminas bello victas admittere liceat ?*

Captis Thebis ab Alexandro, Timocleam, insignem fœminam Thebanam, Thracius quidam Dux constupravit, quumq; post id, eam posceret pecuniam, à muliere ad puteum seductus fuit, in quo dixerat, pretiosiora rerum suarum occultari, Ducemq; sepeos putei spectandi causa inclinatnm, in profundum detrussit, superneq; injectis lapidibus oppressit. Ob id facinus adductam ad se in vinculis fœminam, percunctatus est Alexander, quænam esset, Eaque imperterrita; Theaginis, inquit, sum soror, qui contra Philippum electus Imperator, fortiter pugnans, pro Græciæ libertate occubuit, Magnanimitatem mulieris, & constantiam admiratus rex, liberam eam cum filiis dimisit, Ducem etiam fortassis, quod passus est, meritum, existimans, Stupra certe in fœminas non probasse Marcellum videbatur, qui antequam Syracusas caperet, dicitur curam gessisse pudicitiae servandæ, & Ælianus cum narrasset, à Sycioniis victoribus, fœminarum, & virginum Pellenæarum pudicitiam prostitutam, exclamat, Crudelia hæc per Deos Græciæ, & quantum memoria complector, nec ipsis Barbaris probata. Et Licet multa exempla sunt in contrarium Ineptus est, inquit Gentilis, de Bodino loquens qui trahit ad iustitiam bellicam, hæc usurpata in bello injustè, Neque hic dat talioni locum. Grotius vero ait, stupra in fœminas alii permiserunt, spectantes injuriam solum in alienum corpus, cui injuriæ, quicquid hostile est non subiacere videbatur. Alii non permiserunt actum efferatæ libidinis, qui non magis in bello, quam in pace impunitus esse debet, atq; hoc jus gentium inquit est, non omnium sed meliorum.

Vid. Curtiũ lib. 2., Gentilem lib. 2., cap. 21. late Grotium lib. 3., cap. 4. §. 19.

18. *An Sacerdotes in bello captos durius tractare liceat ?*

Richardus primus Rex Angliæ, Philippum Episcopum Beavoi-censem in bello captum, in carcerem, & vincula conjecit, de quo cum Episcopus ad Pontificem Romanum graviter conquestus esset, Pontifex literis ad Regem datis obnixè rogavit ne filium dilectum

lectum, personam sacram & pastorem gregis Dominici ulterius derineret, unde Rex Legatum ad Pontificem amandavit, & iussit Pontifici ostendere arma, quibus indutus Episcopus captus erat, Et verbis filiorum Jacobi Patri quærenti, de eorum fratre absente, eum alloqui. Hanc invenimus, vide num hæc sit tunica filii tui. Cui Pontifex respondit, Hæc nequaquam est tunica filii, aut fratris mei, sed alicujus sobolis Martis, & per me, illius intercessione pro libertate sua recuperanda, si volet, utatur. Plutarchus vero narrat, quod Cretenſes, cum bellis intestinis colliderentur, à Sacerdotibus omnem noxam abstinerunt, & Gortii à Procopio laudantur qui Sacerdotibus Petri, & Pauli extra urbem pepercerunt. Gentilis vero ait, quod de Mulieribus tradidit, etiam de Sacerdotibus observandum, nimirum si tractent arma, iis non parcendum. Nec extra periculum censet, etiam si arma non tractent, si per expeditiones, & circa opera belli laborantes, milites suos, concionibus, aut verbis excitent, & confirment contra hostes, pro quo adducit, quod apud Æsopum habetur in fabula, de Tubicine, qui cum exercitu profectus, eo superato, in manus hostium incidens, rogavit ne ipsum temerè, & injuste occiderent, quia neminem eorum occidit, nec pugnavit quidem, nec quicquam præter tubam gestabat, cui hostes responderunt, Ob id ipsi magis moriendum fuit, qui cum ipse pugnare non posset, alios ad pugnam excitaret, ait tamen Gentilis, cum hujusmodi militis servis mitius agendum esse.

*Vid. Apothegmat. Anglis, Camd. Remanent. Gentilem lib. 2. cap. 22.
Grotium lib. 3 cap. 10. §. 10.*

19. *An res sacras, & religiosas in bello violare liceat ?*

Cum Titus Hierosolymam obsideret, cum Ducibus præcipuis de templo deliberationem iniit, quorum alii in ea erant sententia ut belli jure uteretur, nec ulli rei parceret, alii à templo violando, abstinendum censebant, nisi Judæi de templo bellarent, quo casu non templum, sed castellum haberetur, Caterum Titus, etsi Judæi templo occupato repugnarent, se virorum loco, res inanimatas ulturum negabat, nec tantum opus se crematurum, cujus vastatio Romanis damno, conservatio ornamento futura esset, Quodque

postea incendio periit id pertinacia Sacerdotum, & Judæorum, qui inde excedere, recusabant, & furore militum, quem Titus cohibere non potuit, contingebat. Pomponius Jureconsultus, ait, cum loca capta sunt ab Hoste, omnia desinunt sacra esse, & idem, sepulchra, inquit hostium, nobis religiosa non sunt, ideoque lapides inde sublato, in quemlibet usum convertere possumus. Thucydides vero, ait, jus fuisse inter Græcos, ut, qui in Hosticum imperum facerent, à locis sacris abstinerent, & Alba à Romanis diruta, Deum templis temperatum est, ait Livius, Gentilis probat in casibus quibusdam nec templis parcere, utpote 1º si ad usus bellicos convertantur, itaq; cum Genuenses fanum Ptolomaidæ occupassent, & munivissent Veneti, fano ut ab hostibus profanato non pepercerunt, 2º cum par pari rependitur, & itaq; si Græcis incensis Sardibus, causam dederunt incendio templi Cybeles, tum Persæ hoc prætexit postea in Græcia templa iuste cremaverunt, Grotius vero ita statuit. Quod licet jus gentium merum sacra non excipiat, & loca religiosa violandi impunitatem indulgeat, violari tamen non possunt, nisi Religione contempta, & quod summa sit ratio, quæ pro Religione facit.

Vid Zonarum, Gentilem lib. 2. cap. 22.

Grotium lib. 3. cap. 5. §. 2. & 3.

Eundem lib. 3. cap. 12. §. 6.

FINIS.

ERRATA.

(Those indicated in the original work are here repeated in italics.)

In original Errata,				
	line 2	for 19		read 9.
	5	cos		eos.
	13	153. l. 33		135. l. 29.
In Table of Contents:				
	Pars ii, Sec. ix,			
	qu. 1	derimere		dirimere.
	qu. 49	icnuria		incuria.
In Principal Work:				
page 4	line 14	for <i>cognitionibus</i>	read <i>cognitionibus</i> .	
5	29	fuisius	fusius.	
9	4	contulere	consulere.	
13	19	<i>Arabianum</i>	<i>Ambianum</i> .	
15	6	exstimarent	existimarent.	
15	16	after <i>decrevimus</i>	add <i>non tribueret</i> .	
15	35	for <i>confirmat</i>	read <i>confirmat</i> .	
16	7	full stop	place a comma.	
17	25	quacunq̃ue	read quacunq̃ue.	
19	4	<i>legales</i>	<i>legatos</i> .	
19	9	addefinitũ	ad definitũ.	
19	12-13	statueent	statuerent.	
19	14	charttae	chartae.	
19	30	resaratas	reseratas.	
20	9	libertare	libertate.	
20	25	Hospito	Hospitio.	
20	25-26	negligentiae	negligentia.	
21	10	intetpres	interpres.	
21	27	Seuatu	Senatu.	
22	7	familtae	familiae.	
22	13	matrimouio	matrimonio.	
24	5	re ali	reali.	
24	15	conjungunrur	conjunguntur.	
25	11	¶ <i>amic</i>	<i>ei amic</i> .	
25	17	intlerunt	intulerunt.	
25	18	t	ut.	
25	19	justae	justa.	
26	9	after <i>civili</i>	add <i>debetur</i> .	
26	21	for <i>aride</i>	read <i>avide</i> .	
27	12	<i>Toluminus</i>	<i>Tolumnius</i> .	

page 27	line 23	for frustratim	read frustatim.
27	23	frustra	frusta.
27	27	<i>Amius</i>	<i>Anius.</i>
28	3	<i>luxus via</i>	<i>luxuria.</i>
28	5	ornatas	ornatos.
28	5	eorum	earum.
29	35	ayveardum	Haywardum.
31	28	miiltaris	militaris.
32	18	torius	totius.
35	4	Ptincipi	Principi.
37	18	delinire	delenire.
41	11	<i>penes quos</i>	<i>apud eos.</i>
41	12	<i>de quibus</i>	<i>de iis.</i>
47	20	after <i>agere</i>	add <i>solet.</i>
48	10	for ad actos	read adactos.
51	22	gesisse	gessisse.
54	7	censura	censuram.
54	31	sortiuntur	sortiuntur.
57	Head line	Pars 1. De Jure	Pars 2. De Judicio.
57	24	sin	sic.
57	28	amissumm aximam	amissum, maximam.
57	28	fertilissimau	fertilissimam.
58	7	assumeretut	assumeretur.
59	29	Imperatoreu	Imperatorem.
60	14	<i>subeunt</i>	<i>subsunt.</i>
60	16	Bersarum	Persarum.
60	27	Bartolns prouuntiando	Bartolus pronuntiando.
61	10	Ira	Ita.
61	26	tegulandum	regulandum.
62	33	absolura	absoluta.
64	19	cuitab	cui ab.
65	31	<i>posse</i>	<i>possit.</i>
66	29	sani	sane.
67	6	sir	sit.
67	20	<i>sic</i>	<i>sicut.</i>
67	35	senis	Senis.
69	24	certa	certae.
70	12	subjectum	subjectam.
70	22	deretminatum	determinatum.
70	27	Consuerudinem	Consuetudinem.
71	3	<i>Manenius</i>	<i>Mancinus.</i>
71	9	<i>ei</i>	<i>eum.</i>
72	26	jacualsset	jaculasset.
73	12	Dominius	Dominus.
75	24	<i>Pistrato</i>	<i>Pisistrato.</i>
76	10	Coriolonorum	Coriolanorum.
77	4	<i>vivus</i>	<i>avus.</i>
77	33	<i>Pierno</i>	<i>Picerno.</i>
79	31	<i>Baleatiam</i>	<i>Galeatium.</i>
79	33	<i>Articam</i>	<i>Arsicam.</i>
79	33	<i>Prionto</i>	<i>Privato.</i>

page 83	line 4	for <i>unde</i>	read <i>ut.</i>
90	12	<i>Seremissimi</i>	<i>Serenissimi.</i>
91	12	<i>asserunt</i>	<i>asserit.</i>
91	29-30	after <i>Stoicorum</i>	add <i>nomine.</i>
97	24	for <i>ratum</i>	read <i>ratam.</i>
99	2	<i>partilcoquo</i>	<i>parciloquio.</i>
99	10	<i>excesssit</i>	<i>excessisset.</i>
99	21	<i>usurpetur dicunt</i>	<i>dicunt usurpetur.</i>
100	28	after <i>iniit</i>	add <i>Gentilis.</i>
103	28	for <i>Henri i</i>	read <i>Henrici.</i>
104	34	<i>detrimenrum</i>	<i>detrimentum.</i>
106	30	<i>foedere</i>	<i>foederis.</i>
108	25	<i>Snbditis</i>	<i>Subditis.</i>
114	19	<i>motu</i>	<i>modo.</i>
114	23	<i>habendum</i>	<i>habendam.</i>
117	26	<i>ostendisse</i>	<i>obtendisse.</i>
121	17	<i>videntut</i>	<i>videntur.</i>
123	27	<i>Indiciis</i>	<i>Induciis.</i>
123	27	<i>tractutus</i>	<i>tractatus.</i>
124	7	<i>pascisci</i>	<i>pacisci.</i>
128	32	<i>Amicam</i>	<i>Atticam.</i>
129	26	<i>lignamine</i>	<i>ligamina.</i>
130	9	<i>videbatrur</i>	<i>videbatur.</i>
130	28	<i>obnoxium</i>	<i>obnoxius.</i>
131	32	<i>subdito</i>	<i>subditis.</i>
132	9	<i>entium</i>	<i>ensium.</i>
134	7	<i>Capitanes</i>	<i>Capitanei.</i>
134	21	<i>eorum</i>	<i>ejus.</i>
135	29	<i>in fraenum</i>	<i>infraenem.</i>
136	12-13	<i>non impediunt</i>	<i>nihil impedit.</i>
137	4-5	Full stop after "Alexander "	instead of after " donavit."
138	24	for <i>Antonins</i>	read <i>Antonius.</i>
138	24	<i>camparuerunt</i>	<i>comparuerunt.</i>
141	34	<i>ustriacum</i>	<i>Austriacum.</i>
142	14	<i>Elelectores</i>	<i>Electores.</i>
142	14	<i>prescriptionem</i>	<i>proscriptionem.</i>
142	16	<i>Qod</i>	<i>Quod.</i>
142	23	<i>Comissorium</i>	<i>Commissorium.</i>
144	22	<i>infestandam</i>	<i>infestandum.</i>
144	34	<i>accomodarent</i>	<i>accommodarent.</i>
144	37	<i>Supetiis</i>	<i>Suppetiis.</i>
147	11	<i>propositi</i>	<i>propositae.</i>
152	4	<i>decernendum</i>	<i>decernendam.</i>
154	8	<i>aliter</i>	<i>alter.</i>
154	11	<i>mures</i>	<i>muros.</i>
155	16	<i>Daniadas</i>	<i>Danaidas.</i>
155	30	<i>petmisum</i>	<i>permissum.</i>
156	5	<i>An in Castra, Quaestio tota delenda.</i>	
157	10	for <i>ab</i>	read <i>ad.</i>
161	12	<i>terminetur</i>	<i>terminentur.</i>
162	9	<i>curandnm</i>	<i>curandum.</i>

page 163	line 31	for legi	read lege.
164	18	hostis	hosti.
164	25	Geutilis	Gentilis.
165	4	ant	aut.
165	32	long esatis	longe satis.
166	6	agros &	& agros.
166	34	Gentlem	Gentilem.
168	21	discretionem	discretionem.
168	27	deduut	dedunt.
169	13	m ltum	multum.
170	8	ducuntut	ducuntur.
170	12	possint	possint.
170	17	gravissime	gravissime.
171	5	soci	socii.
171	20	exeludebat	excluebat.
171	26	conrta	contra.
171	30	conttahere	contrahere.
172	6	after <i>pro Rege</i>	add <i>Hispaniae.</i>
172	8	<i>missus est</i>	<i>missus esset.</i>
172	9	rransigeret	transigeret.
172	12	idoncum	idoneum.
173	16	Solymaunus	Solymannus.
173	22	Paincipem	Principem.
173	24	Tribuuns	Tribunus.
173	28	fuetat	fuerat.
174	27	probatum	probatam.
182	1	in eritur	inseritur.
183	5	Iivium	Livium.
183	24	denuntiatio	denuntiationem.
184	15	ad movendum	admovendum.
184	16	obstringere	obtingere.
184	18	exorire	exoriri.
184	32	Papae	Papam.
185	3	convenrient	convenirent.
187	30	ttecenti	trecenti.
189	22	nnum	unum.
189	25	factione	fictione.
191	7	Campsani	Capsani.
192	1	Centum	Brutum.
193	25	ignomiosum	ignominiosum.
194	5	seperos	super os.
194	23	after non	add incongrue. (?)
196	13	for Graecis	read Graeci.

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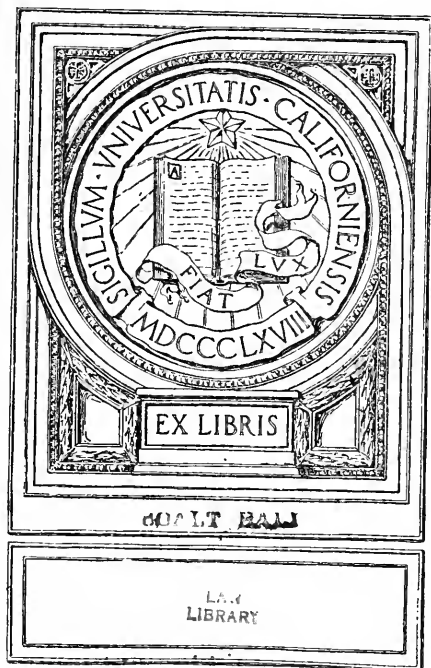


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BY RICHARD ZOUCHE

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The author of the Elements of Jurisprudence, when setting out to show the foundations of Law and Procedure in accordance with the principle of human community, laid down first the general principles of Law and Procedure for a community in general; secondly the rules of Private and Public Law and Procedure for the communities which subsist between one private person and another, and between private persons and princes. He afterwards composed descriptions of the Law and Procedure of special communities; the Sacred, which is concerned with religion and pious causes; the Military, with military service in war and peace; the Maritime, with navigation and commerce; and the Feudal, with fealty and peace. In the three former he confined himself to the authorities of the Civil Law; for the last, the Feudal Community, he availed himself of the Milanese and Norman bodies of Customary Law. At length, being about to proceed to the explanation of those matters which relate to the community which exists between different princes or peoples, he found it necessary to consult other authors learned in historical law. Of these he considered that Albericus Gentilis and Hugo Grotius should be regarded as his leaders, both men distinguished in every branch of learning, of whom the former weighs his statements in the scales of law, the latter in those of reason. He has also consulted other authors, according to the subject of which he is treating; and after first setting forth certain propositions as to which there is little doubt about the law, he has reduced to the form of questions matters as to which the law appeared to be in controversy. In these he has refrained from deciding any point according to his own opinion, thinking it wiser to follow the practice of the Socratic Academy, which, after adducing cases and principles, and expounding the arguments on one side and the other, left the judgment of the hearers free and unfettered. The work, such as it is, he has composed

under the favor of Divine Providence, in fulfilment of the duties of the office which he has for some time held in the University, for the use of the youthful student, during a period of leisure not in other respects happy; if it prove useful to others without bringing discredit upon himself, his desire will be accomplished.

[Here in the original follows a very imperfect list of *errata*, all the entries in which are now incorporated in the full list of *errata* placed at the end of Vol. I, of this edition.]

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[Discrepancies in numbering sections in the contents of the original and in the text of the original are here corrected, so far as possible, by the insertion of bracketed numbers.]

PART I.

SECTION I.

Of Law between Nations and of the Law of Peace.

Law between Nations is the law which is recognized in the community of different princes or peoples who hold sovereign power—that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another, and which is observed by nations at peace and by those at war. Peace is a legal concord between different princes or peoples whereby they live one with another in security; and its law regards Status, Ownership, Duty, and Wrong, among those at peace.

1.

That which natural reason has established among all men is respected by all alike, and is called the Law of Nations, as being a law which all nations recognize, as the jurist Gaius says. In the first place, it is the common element in the law which the peoples of single nations use among themselves; inasmuch as of individual men some are free, others slaves; some things are common, others in private ownership; some persons are held to be bound on their contracts, others on their delicts. Secondly, it is the law which is observed in common between princes or peoples of different nations; since by this law, as a jurist also says, nations are separated, kingdoms founded, commerce instituted, and lastly, wars introduced. Law of the latter kind I choose to describe as "*Jus inter Gentes*" or Law between Nations. Among the Romans it was called by a special name, "*Jus Feciale*," being handed down from the ancient nation of the *Æquicolæ*; and the study of this law Cicero called an excellent science, which has to do with the conditions of kings, peoples, and foreign nations, in fact with the whole law of Peace and War. For the College of the *Fecials*, as Dionysius of Halicarnassus records, was founded by Numa Pompilius and to their charge was intrusted the duty of examining agreements, treaties, wrongs done to allies and others, of advising on the send-

ing of ambassadors, on demanding the restoration of property, on renouncing friendship, and on declaring war, and of duly carrying out the decisions on such questions. The books which were written on this law have perished, but traces of it may be found in the Sacred books, the Pandects, and the Codex Juris Romani, in Greek, Latin, and other writers (whose opinions and testimonies establish what has been received on such questions in accordance with natural reason by the customs of nations); because when many persons at different times and places lay down the same principle, that principle must be referred to a universal cause, which can not be other than either a right conclusion proceeding from the first principles of nature, or some general agreement, of which the former points to the Law of Nature, the latter to the Law of Nations. Furthermore, besides common customs, anything upon which single nations agree with other single nations, for example by compacts, conventions and treaties, must also be deemed to be law between nations, since the solemn promise of a state establishes law, and whole peoples, no less than single persons, are bound by their own consent.

2.

Secondly, this Law between Nations holds between those nations or peoples who hold sovereign power, or a universal and supreme power of deciding questions concerning the community between nations both in peace and in war; because by power of this kind single persons, families, and nations are bound together into one body, so that all are deemed to will and to act together. Many, however, or the majority of men, being outside Sovereignty, and each one having his own will, act not as a people but as single persons, so that there are as many actions as there are persons, and if one in the number has not consented to nor assisted in an act he is not deemed to have done it.

3.

Peace, in the words of Augustine, is "ordered concord," which may be understood as referring to peace in general; its different forms others distinguish more exactly according as the "order" regards superiors or equals. To the former kind belong "moral peace," when a man's affections agree with his domestic duties, or when the members of a family agree with the head or father of the family, and "civil peace" when subjects agree with their prince. Of the latter kind is the concord of neighbor with neighbor, state with state, kingdom with kingdom. The basis and attendant of each form of peace is justice; thus the Royal Prophet says of the blessed age, "Mercy and Truth are met together; Justice and Peace have kissed each other." The fruits of peace are that one lives with another in security, and that each is free to enjoy his own rights without let or hindrance; whence peace is defined by Cicero as

“ free tranquillity,” and among the deities worshiped at Rome “ Quiet ” was celebrated after Concord and Peace; and in that golden age which the poets imagined the condition of the whole human race was sung as one of peace, because in those days it was supposed that all men were just and innocent, since, as Arnobius says, if all nations would but heed the peaceful commands of reason, the whole world would dwell in tranquillity. But since men, from a depraved reason and corrupted customs, have become ill-affected one towards another, and those who recognize no superior have none to restrain them, it has come to pass that peace only prevails among those princes or peoples who, abhorring offenses and injuries, have united in a concord agreeing with justice, as it were by some special inclination.

1. *Digest*, I, 1, 9; I, 1, 5; *Dionysius of Halicarnassus*, book II; *Rosinus*, book III, ch. 21; *Bodin*, book V, last chapter; *Gentilis*, I, 1; *Grotius*, *Prolegomena*.
2. *Bodin*, I, 1; *Hobbes*, *the Citizen*, ch. 6. 3. *Conrad Braun*, on *Seditious persons*, I, 2, § 8.

SECTION II.

Of Status among those at Peace.

Status among those at peace is their condition among themselves, and with others; their condition among themselves is that whereby they are subjected to civil government, which may be Paternal, Royal, or Popular; their condition with others is that in virtue of which others are regarded as Friends or Allies.

1.

To community between nations belongs first the status or condition of peoples among themselves, which depends on their organization and rule, and in so far as it is voluntary and acceptable to its subjects may be called "civil government." Such was at first the government of parents, which was derived from the procreation of children and propagation of families, and belonged absolutely to the "pater familias," with a view to the provision of those things which conduced to the well-being of himself and his family. Later, when by the propagation of numerous descendants nations were formed, and power over their descendants belonged to the chiefs—(for under the name of parents are included grandfather, great-grandfather, and all generations of ascendants)—it came to pass that government of this kind was diffused over whole nations; and hence, as in sacred literature those who are chiefs over several families are distinguished by the name of "patriarchs," so in the civil law they are distinguished as "principes familiarum." Theologians record that this form of rule lasted in civil matters from the time of our first parents down to the time of Nimrod, and that in the sacred matters of the Old Testament power remained with the patriarchs or heads of families among their kindred before and after the Flood down to the time of Moses.

2.

Royal Government is the power of one man over a people. At one time this power, which Aristotle calls *παμβασιλεία*, was absolute, when one man for the common advantage had power to act and command in all things at his pleasure, and was not bound to render account to any; whence he was called *αὐτοκράτωρ*, or "self-sufficient"; and *ἀννπεῖθνος*, that is, "subject to no man's authority"; and he records that such government was modeled on the paternal. Justin too says of it:

“ In the beginning of things government over races and nations was in the hands of kings, who were raised to this pinnacle of majesty by no courting of the popular favor, but by their own moderation approved among good citizens; the people were bound by no laws; the will of the princes stood for laws; kingdoms were confined each within its own boundaries.”

And of the Roman government the Jurist Pomponius says:

“ In the beginning of our state the people at first lived without fixed ordinance or law, and all things were guided by the hand of the kings.”

At a later date royal power was in some cases limited by laws, like the government which Aristotle calls “ Heroic ”; in others it was subject to magistrates, like that of the Spartan kings to the ephors; and in others again it ended with life, as did that of the first Roman kings.

3.

Thirdly, popular government is where a people, free and exempt from the authority of a prince, retains all power in its own hands, as power lay with the Roman people after the kings were driven out; it is either intrusted to a few eminent citizens, who are called “ optimates,” which form of government is called “ aristocracy,” or is exercised by all, that is to say by the votes of all the citizens or of a majority, which form is known as “ democracy.” Finally, princes and peoples in whom government is vested are some of them greater and more powerful and have resources more widely diffused; others lesser and weaker, and have their strength confined within narrower bounds.

4.

Secondly, the status or condition of princes or peoples with others in time of peace is that in virtue of which others are regarded as friends or as allies. For just as we ought, according to a jurist, to receive as friends those private persons with whom on honorable grounds we have ties of familiarity, so between different princes or peoples relations are more familiar with some than with others on the ground of a common origin, nearness of territories, a common language, opportunity of rendering mutual services, and the like; and hence from friendship follow rights of hospitality and of commerce. Thus the jurist Pomponius says that there are nations with whom we have neither friendship nor hospitality; and the Romans were wont to confer rights of hospitality as a favor; thus when their ambassadors, who were carrying the golden bowl to Delphi as a gift to Apollo, had been intercepted by pirates and carried to the Liparæ Islands, where it was the custom to divide the booty taken, and Timasitheus, the chief magistrate for that year, after having entertained the ambassadors as public guests, had escorted them with a guard of ships to Delphi, and thence restored them safe home, the

right of hospitality was conferred on him by a decree of the Senate, and gifts were presented to him by the State. The right of commerce is referred to in the argument of Arco in the assembly of the Ætolians, in favor of establishing friendship with Perseus, King of Macedonia: "Our nearness to Macedonia," said he, "places us in a favorable position for offering and asking the right of commerce; lest by closing our own territories we shut ourselves out from the kingdom of Macedonia." This right Bodin too explains more fully as "the liberty to enter, dwell, and do business in the territory of others, to make bargains and contracts, and to carry on a free trade in certain articles, or in all, between the two countries." As Proculus says, it is when others retain their liberty and the ownership of their property as fully in our country as in their own, and when we have the same privileges in their country.

5.

Again, as between private persons, between members of the same family, for example, and between coheirs, there exists a partnership or alliance binding those who share in the common gain and loss to help one another; so between different princes or peoples there is an even closer bond of alliance, the object of which is to maintain the common security and to avert any danger which may be impending and may concern all of the same kindred, religion, condition, or the like, and in virtue of which they are prepared to combine their forces and to help one another; since, as Hannibal said in the council of Antiochus, "A common advantage is the strongest bond of alliance."

Thus when Philip, King of Macedonia, made war on the Athenians, the Thebans joined them voluntarily; but the Athenians, says Curtius, wearied the whole of Greece with their embassies, thinking that the common enemy ought to be destroyed by the common forces; so too the Campanians, fighting for the Sidicini against the Samnites, said: "We have fought, nominally for the Sidicini, but really for ourselves; for we saw a neighboring people the victim of an impious raid of Samnites, and knew that when our neighbors had been consumed, the fire would pass on to us."

The Romans addressed foreign kings with whom they lived at peace, and who had rendered them conspicuous services, as "friends and allies," as a mark of honor. Thus when they heard of the energy of Ptolemy in the war against Tacfarinas, the revival of the ancient custom, says Tacitus, was demanded of Tiberius, and a senator was sent to present the ivory staff and embroidered toga, the ancient gifts of the Fathers, and to hail him as "King, friend, and ally." But when Vermina, the son of Syphax, who had assisted the Carthaginians, asked the Roman Senate that he might be styled king, ally, and friend, the answer was that his father, without cause, had suddenly become the enemy of the Roman people

instead of their friend and ally, and that Vermina himself had passed his early manhood in a war provoking the Romans, and should therefore rather sue for peace than for the title of king, friend, and ally, an honorable name reserved for those who rendered great services to the Republic.

1. Bodin, I, 4; William Lambard, *Archion, or a Commentary on the High Court of Justice in England*, ch. 1; Prideaux, *Introduction to the History of Monarchy*, I; Bucanus, *Theological Institutes, or an Analysis of the common topics of the Christian Religion*, 42, § 6.
2. Aristotle, *Politics*, book III, ch. 11; Justin, book I, beginning.
3. Aristotle, *Politics*, III, 5 and 10; Bodin, II, 1, 2, etc.
4. Arnisaeus, *Law of Magistrates*, I, 4, § 4; Gentilis, I, 15; III, 8.
5. Curtius, I, etc.

SECTION III.

Of Ownership among those at Peace.

Ownership among different princes or peoples between whom peace exists, is the right which each of them separately has over things, especially over territories, without prejudice to others, and such right is regarded as either Plenary, or Hereditary, or merely Usufructuary.

1.

To community in time of peace belongs also ownership—that is to say, the right which princes and peoples enjoy over things without injury or loss to others; and such ownership, in movable goods, is acquired generally by the same modes as among private persons. Not very different again are the modes by which immovable things also, such as cities and regions, come into their ownership; which, when government or power is exercised in them over persons, are called territories and kingdoms, and are possessed either in plenary, or hereditary, or merely usufructuary right.

In the first place kingdoms or territories are held in plenary right by whole peoples, and sometimes by princes; thus Strabo records that the island of Cythera, which lies off Tænarus, belonged to Euricles, King of Sparta, in his own private right; and in the same case are places which are acquired by occupation and prescription, or transferred to others by gift and testamentary disposition. There may be occupation of those things which before have belonged to no one; and it was by this mode that Japhet, Shem, and Ham, the sons of Noah, after the Flood obtained for themselves regions, marking them off throughout their lands among their nations, each nation after its families. By the same mode in later ages uncultivated places, islands in the sea, and parts of the sea itself have passed by occupation into several ownership.

Akin to occupation is prescription, when regions which have belonged to some one have been abandoned by him and are acquired by another by long possession; thus, when the king of the Ammonites claimed the lands between Arnon and Jabbok, from the Arabian Desert unto Jordan, Jephthah pleaded possession for three hundred years, and asked the king why he and his forefathers had abandoned it all that time. As to gift, King Solomon gave twenty cities to Hiram, King of the Phœnicians; Agamemnon in Homer promises to give seven cities to Achilles; and King Anaxagoras gave two parts of his kingdom to Melampus.

By testamentary disposition, Abraham determined, if he should die without children, to leave his possessions to Eliezer, his steward; Molossus the bastard succeeded to the kingdom of Epirus by the will of Pyrrhus who had no legitimate children; Mithridates, in Justin, says that Paphlagonia came to his father not by force of arms, but by testamentary adoption; Attalus, King of Asia Minor, and Nicomedes, King of Bithynia, made the Roman people their heir; the parts of Lybia about Cyrene were left to the same people by the will of King Apion, and the kingdom of Egypt became part of the Roman people's dominions by the will of an Alexandrian king.

2.

Secondly, those kingdoms are possessed in hereditary right to which succession gives a right. Such succession is either the more ancient form, in which the next of kin to the last deceased is looked for; or the later form, in which regard is had also to the descendants of the first king. In the former there was a preference on grounds of sex and age; thus Herodotus says: "It is the custom of all peoples that the eldest-born should have the government"; and Justin: "Artabazanus the eldest-born claimed the kingdom by privilege of age," a privilege which both the order of birth and nature herself has established among nations; unless, indeed, the elder should be illegitimate, in which case the Macedonians thought that the kingdom rightly belonged to Demetrius the younger, rather than to Perseus the elder. On the failure of sons, daughters succeeded; thus Justin said that the government of the Medes belonged to a daughter, because Astyages had no male issue; and Cyrus declared that Media was the right of his daughter, because he himself had no legitimate male offspring. But if a deceased king left neither sons nor daughters, a brother was admitted to the succession; thus, when Polydectes, King of the Spartans, had died without children, his brother Lyncurgus obtained the kingdom for a time.

Succession in which regard is had also to the descendants of the first king is called "lineal," and passes from the direct line to collaterals; the direct line is the line of children, grandchildren, great-grandchildren, and so on; the collateral line is that of brothers, uncles, paternal and maternal, and so on; and in both cases there may be as many lines as there are persons having descendants. Of these the nearer of kin excludes the more remote; but on failure of the nearer, even the remotest degrees are admitted. This lineal succession is either agnatic, where males only succeed, and transmit the right to males, which is said to be the rule in the French kingdom; or cognatic, where both males and females are admitted, preference being given in any degree firstly to the male sex, and secondly to priority of birth, so that the succession never passes from one line to another on the ground of sex or age; and this form of succession is observed in most other kingdoms of Europe.

The alienation or testamentary disposition of these kingdoms or their parts, so as to prejudice successors and the people without their consent, is not permitted. Thus the English held null and void the delivery of the kingdom which King John had made to Pandulph, the Papal Legate, without consulting the barons; the Scots refused to recognize the English rule which John Balliol had imposed upon them against their will; and Francis the First, King of France, who, in captivity, had promised to cede certain provinces of Burgundy to Charles the Fifth, when the ministers of the viceroy of Naples required him at the moment of his landing to fulfil his promise, replied that he must have the consent thereto of the subjects of Burgundy, whom he determined to consult in assembly.

The same rule applies to testamentary disposition; and so when Philip, King of Macedonia, had it in mind to leave the kingdom to his brother's son Antigonus, excluding Perseus, who had wickedly induced him to put to death his son Demetrius, in order to win the consent of his subjects, he went round the cities of Macedonia and commended Antigonus to the princes; and although Charles the Great and Louis the Good made wills bequeathing their kingdoms, the wills had rather the force of a recommendation to the people than of a true disposition; indeed Ado particularly records of Charles that he wished his will to be confirmed by the Frankish nobles. When Humbert, Prince of Dauphiné, was left childless, he bequeathed the principality after his death to the King of France, on condition that the first-born son of the king should forever be called "the Dauphin"; but the nobles of the kingdom first consented to the disposition, having persuaded him to bestow the principality on the son of the King of France rather than on the Roman Pontiff, to whom he had decided to sell it.

3.

Thirdly, kingdoms are held in merely usufructuary right, which kings hold for the term of life only, and to which, on their decease, others are promoted by the votes of the people, or of those who have power delegated to them by the people. Such was the kingdom of Numa Pompilius, Tullus Hostilius, and the other successors of Romulus, who laid the foundations of the Roman State; and of the emperors who succeeded Augustus Cæsar in the days of Rome's greatness. As such are regarded the German Empire, the kingdoms of Hungary, Bohemia, Poland, Denmark, and Sweden, in all of which, it is said, princes ascend the throne by means of votes, most of them taking an oath on their admission not to depress the condition of their kingdoms, some even to win back provinces which have been alienated. Thus when Frederick the Second sought to win back Sardinia, which the Roman Church had claimed for herself, and the Pope reminded him of the oath which he had

taken to defend the things of the Church, he replied that he had first sworn to win back the things of the Empire, from which Sardinia had been wrongfully wrested; the prior oath was the more binding, and the interests of the Empire, supported, as they were, by the better title, ought to be nearer to his heart than the cause of the Roman Church.

Others, however, seem less mindful of an oath of this kind; as Charles the Fourth, who transferred the kingdom of Arles to the French; Louis of Bavaria, who allowed the Swiss to secede from the Empire; and Rudolph the Hapsburg, who sent his chancellor to Italy to grant freedom and independence from the Empire to any peoples who cared to buy it, on which occasion the Florentines redeemed their freedom for six thousand florins, and the people of Lucca for twelve thousand.

1. *Grotius*, I, 3, § 12; II, 3, § 7; II, 4, § 2. 2. *Grotius*, II, 7, §§ 12, 13, etc.; I, 7, § 12; *Arnisaeus*, III, 1, § 10. 3. *Arnisaeus*, III, 1, §§ 11, 14, 15.

SECTION IV.

Of Duty between those at Peace.

Duty or courtesy between those at peace is that which ought to be mutually rendered between different princes or peoples between whom peace exists, as for instance, the right of Civil Congress, Embassy, Convention, and Treaty, resting either on good faith alone, or on a solemn oath besides.

I.

1.

Among the duties owing in time of peace between different princes or peoples, one of the most important is the right of civil congress or conference, whereby they themselves or their delegates are enabled to meet one another and treat of affairs with dignity and security.

Dignity is marked in many ways. Thus, in the first place, when powerful princes come to a conference, other princes or illustrious persons proceed to meet them, for this form of courtesy indicates both friendship and respect. So Polybius records the magnificent decrees of the Athenian people on the meeting and reception of Attalus; the Roman Senate sent envoys with orders to proceed as far as possible to meet Galba, who was coming from Spain to Rome, as far indeed as Narbona, in order to bid him a cordial welcome in the name of the Republic, and to beg him to accede to the desire of all that he should march with all speed to the City; Cyrus proceeded to meet his uncle Cyaxares, attended by the horseman of four nations; and Theodosius, when Athanasius had been driven out by the Germans, met him at a great distance from the city of Constantinople.

2.

In the second place dignity is marked by the inferior approaching the superior. When Perseus, son of Philip, King of Macedonia, had come to a conference with the Roman Consul Martius; "a river separating the two" (the words are Livy's), "some delay was caused by an interchange of messages as to who should be the first to cross it. The envoys of the king urged the respect due to the royal majesty, those of the Romans that due to the name of Rome, more especially as it was Perseus who had sought the conference; finally Martius (whose own

name was Philip) put an end to the delay by saying in jest, "Let the younger cross to the elder, the son to the father," words which upheld the majesty of Rome under the cover of personal courtesy; and the king readily agreed to this course."

So Artabanus, King of the Parthians, almost the only monarch who had not graced a Roman triumph, respected the power of Rome so highly that he sent envoys to Germanicus, by whom, besides offering a treaty and friendship, he announced that as a mark of respect he would come to Germanicus on the bank of the Euphrates; and Sleidanus records that on the same principle Francis the First, King of France, allowed the emperor Charles the Fifth to be the first to arrive at the Dead Waters, the place appointed for their conference; and it was this that caused the reply of Ariovistus to Cæsar's ambassadors to be regarded as an arrogant one, when he said that if he had needed anything from Cæsar, he would have gone to Cæsar, but that if Cæsar wanted anything from him, let Cæsar come to him.

Akin to this is the rule that an inferior meeting a superior should as a mark of respect be the first to dismount from his horse; thus Tirdates, King of Armenia, when he arrived at the place appointed for the conference between himself and Corbulo, leaped first from his horse at sight of Corbulo. But when Crassus, after his disaster, had dismounted, and was walking up to Surenas, and Surenas seeing him said mockingly, "What is this? does the Roman general go afoot, and we sit on horseback?" Crassus answered, under constraint but with dignity, "Neither does wrong, each meets the other in the manner of his country," for the Parthian, as Tacitus says, relies on his cavalry, the Roman on the columns of his infantry. The same rule is observed in entertaining at a banquet; for when Caius Cæsar, sent by Augustus into Syria, met the King of the Parthians, the Parthian first attended a banquet with the Roman on the Roman bank, and afterwards the Roman attended a banquet with the king on the enemy's bank.

3.

In the third place it is a rule that, as a mark of dignity, the inferior at a congress should first address the superior; and so, when Antigonus proposed that Eumenes should address himself as the superior, Eumenes angrily replied, "I count no man my superior, so long as I am master of a sword." When the consul Titus Quintius, as Livy relates, came to a conference with Philip, King of Macedonia, he, at the king's request, began to speak; which shows that the king, in begging the consul to speak first, recognized that it was his own duty, as the inferior, to have done so. And Sulla, at a congress between himself and Mithridates, expressly told the king that it was a suppliant's part to speak first, a victor's part to hear his prayers in silence.

4.

Moreover, at congresses and conferences leave should be given to provide for security, lest either the number of attendants or the convenience of the place should afford an opportunity for treachery. Thus, when Perseus had determined to cross the river to Martius, another dispute arose, says Livy, as to the number who should cross with him; the king proposed to cross with all his cavalry; the ambassadors of Martius urged that he should come either with three attendants only or, if he brought so large a troop, that he should give hostages to secure that there should be no treachery at the conference; and the King gave as hostages Hippias and Pantaucus, the chief men among his friends; but Livy says that the hostages were given not so much as a pledge of good faith, as to make it apparent to the allies that the king in no way met the ambassadors on terms of equal dignity.

To avoid an ambush suggested by the convenience of the place, one side sometimes holds the conference from a ship; thus when Philip, King of Macedonia, and Titus Quintius, the Roman consul, came to a conference on the coast near Nicæa, the Roman, as Livy records, advanced to the edge of the shore, and when the king came forward to the bows of a ship riding at anchor, said "We might speak and listen to one another more conveniently at close quarters, if you would disembark"; and when the king refused to do so, Quintius added, "Whom, pray, do you fear?" To which the king with royal courage replied, "I fear none save the immortal gods; but I do not trust the faith of all those whom I see around you, and least of all the Ætolians," among whom was their commander Phaneas. "The risk of treachery," said the Roman, "is the same for all who meet in a conference." "True," replied the king, "but in this case the reward of treachery, Philip or Phaneas, is not the same; for the Ætolians will find it easier to provide another commander than the Macedonians a king in my stead."

Of the congress between Edward the Fourth, King of England, and Louis the Eleventh, King of France, Comines writes that when a convenient spot for the conference was required, the French king sent himself and Boccage, and the English sent Howard and Chaloner, with a herald to look for one; having carefully examined all the region and bank of the river Somme, they fixed on the town of Pecquigni, three miles from Amiens, as a suitable spot; and there they decided that a bridge should be erected for the meeting of the kings; in the center of the bridge was placed a grating of moderate height, like that of a lion's cage; the openings between the bars were large enough to allow easily the passage of an arm, and the whole was roofed in above to keep off the rain, so amply, indeed, that twelve men might stand on each side. The grating embraced each side of the bridge, so that no passage was open from one side to the other; on the river was one small boat only, with two oarsmen. Every-

thing being ready for the conference, on the next day both the kings arrived at the place; Louis, first, with eight hundred cuirassiers, Edward with his whole army; but each brought with him twelve men only, and while the kings conversed four of them were appointed on each side to watch what was done on the other side. With the French king were, among others, John, Duke of Bourbon, and his brother the Cardinal; and as soon as Edward arrived at the place, accompanied among others by his brother the Duke of Clarence, the two kings embraced one another very warmly through the gaps in the grating, and Louis, speaking first, said: "Your coming, Cousin, is welcome to me above all things; nay, there is no other prince to-day whose sight and conversation I had rather enjoy; and therefore I render thanks to Almighty God, by whose favor we are met here to confirm an everlasting friendship." Edward having replied to these words in French, his chancellor took up the conversation. And on this wise are the observances which are practised at the congresses of princes and of the representatives of princes.

5.

Lastly, in the congresses and conferences of those who are the representatives of princes, regard must be had to the dignity of those whose persons they sustain. In virtue of this, in the first place, some claim to precede others and to sit in a higher place. Hence Mendoza, the ambassador of the King of Spain at the Council of Trent, being indignant that the highest place among the royal ambassadors was not given to himself, declared that, though he did not claim to precede, yet he could not be compelled to follow, the ambassadors of the French. When Sulla had three seats brought, and gave one to Ariobarzanes, another to Orabazus, the ambassador of Arsaces, King of the Persians, and took the third and center one himself, and then heard Orabazus deliver his message, Arsaces put Orabazus to death on his return, because he had yielded place to Sulla.

In the second place, the order of speaking and the language are governed by the precedence of the persons, the higher in dignity awarding the turns of speaking. Thus in the council of the Ætolians, as Livy relates, although the first place belonged to the majesty of Rome, yet by permission of the Roman ambassadors the Athenians and Macedonians spoke first, the Romans preferring to speak last, so as to be able to reply to the arguments of the others. That to use a nation's own language is a mark of honor, appears from the story which Cicero tells how Verres made it an accusation against him that in a Greek Senate, to wit the Syracusan, he had made a speech in Greek; and of Augustus it is said that though he was ready and fluent in the Greek language, yet he did not use it on all occasions, and in particular refrained from using it in the Senate. He also forbade a soldier, when asked in Greek to give evidence, to answer otherwise than in Latin.

And so when a question of the language to be used arose at a congress of ambassadors of England and Spain, and the ambassador of the Spanish King, feigning to be willing to make a concession to the dignity of Elizabeth, Queen of England, said jokingly to the jurist Dale, her ambassador, "We will treat in French, as your mistress is Queen of France," Dale (whom Bodin somewhere calls a man no less eminent in learning than in honor) replied, as though willing to pay a like honor to the king of Spain "Nay, in Hebrew, if you will, since your master is King of Jerusalem."

But in these cases, it is sometimes deemed wiser, in order to avoid a dispute, to adopt equality or some middle course. Thus Comines relates that at a conference held in the palace of the Duke of Milan, the ambassadors of the Emperor, the King of Spain, and the Princes of Italy were placed on one side, those of the King of France on the other, and the jurist Gannæus was added by the King of France to make the speeches in Latin. Two clerks were also present to commit what was said to writing, one in French, the other in Italian.

6.

As at congresses and conferences, so too in letters and documents between princes, the due measure of honor should be observed according to the dignity of the persons; and hence the omission of any part of a title is regarded as an insult. Thus at the convention of Naumburg, in the year 1561, a letter of Pope Pius the Fifth to Augustus, Elector of Saxony, and the other Protestant princes having been delivered by the hands of ambassadors, with the following inscription: "To our Beloved and Noble Son, Elector, Duke, Landgrave, etc.," the princes, since they thought themselves more than noble, did not deign to unseal or open the letter, but returned it unopened and fastened to the care of the ambassadors, as we learn from De Thou; and when Gustavus Adolphus, King of Sweden, received a reply from the Electors to a former letter of his own, in which the title of king was omitted, he sent them an answer to this effect:

"We have received your reply to our letter of last year; at first sight we could hardly bring ourselves to break the seal, seeing that it did not ascribe to us a title which we and our ancestors have received from God alone, and which for twenty years we have asserted with a strong hand, and are resolved to assert forever, until our last breath; we have, however, opened it on the condition that henceforth our friendship be not broken by insults of this kind."

The Electors afterwards apologized for their conduct in the following terms:

"Most Serene King, although in our letter we omitted a part of your title, we pray your Majesty to be assured that the omission arose not from any spirit of estrangement nor from any desire to detract from

the honor of your Majesty, but from the use and custom which we observe towards all Kings whomsoever."

It is a like breach of etiquette for princes of lower rank to place their names in a letter before those of princes of higher rank. This was pointed out in another letter of the same King of Sweden to the same Electors, in which he intimates that he has received their letter, and recognized from the propriety of the address that it was couched in better form than their previous letter which omitted the title of king; but on opening it, he was not a little surprised to find that, contrary to the established custom and the usual style of electoral letters, not only to himself, but also to other kings, the names of the Electors were placed first, as though with the deliberate intention of slighting his royal dignity and eminence by placing others before his own kingly name; whatever might be the explanation, it was in this sense that he interpreted the incident; and if an error had crept in by the fault of the copyists, and so on.

The rather arrogant letter of Pope Adrian to Frederick the First, confirms this, in which he says:

"We marvel that you do not pay that reverence which you owe to the Blessed Peter and the Holy Roman Church, seeing that in your letter to us you place your name before our own, whereby you incur the reproach of insolence, not to say ignorance."

With this agrees the gloss on the celebrated but suspected law which begins with the words, "Inter Claras" (Code, De Summa Trinitate), the inscription of which runs thus: "To our most Glorious and Merciful son, Justinian Augustus, John Bishop of the City of Rome"; where Accursius has this note, "Formerly the Pope in a letter placed the Emperor's name before his own, which he would not do to-day."

II.

I.

Secondly in time of peace there is between different princes or peoples a right of civil embassy. An embassy, which the Greeks call "*ἐκδημος πολιτεία*" or external administration, is the management of public business with foreigners by agents. Strictly an embassy should proceed from those who hold supreme power; but in a looser and derivative sense it may be sent out by others, as for instance by colonies, municipalities, or provinces. Of this class are, for the most part, the embassies treated in the titles of the Civil Law "*De Legationibus*." Moreover in civil disturbances, embassies are said to be sent by one party in the state to another, as by the Plebs (who had seceded to the Aventine) to the Patricians, and by the leaders of a party to those of another, as by Caius Manlius to Martius Rex, and by Brutus and Cassius to Antony and Lepidus, between whom ambassadors are recorded to have passed with messages.

2.

In the second place some embassies may be called *religious*, others *ceremonial*, others *watching*, and others *necessary*.

(1°) They are *religious* when ambassadors are sent to perform some sacred duty, as when, after the defeat at Cannæ, one Fabius Pictor was sent to Delphi by the Romans, to inquire of the oracles by what prayers and supplications they might appease the god; or when Marcus Pompeius Matho and Quintus Catulus were sent to the same place to bring offerings out of the booty taken from Hasdrubal.

(2°) Those embassies are *ceremonial* which, as Tacitus says, are instituted for a ceremonial object; for example, when ambassadors are sent with instructions to offer congratulations, sympathy, and the like; and they are properly so called when accredited by inferiors to superiors. Thus, ceremonial embassies from all quarters of the earth came to Alexander. When sent from equals to equals, however, they are called *honorary*, or instituted for honor. Among them are comprised, firstly, *congratulatory embassies*, such as were those which the Rhodians mentioned in the Roman Senate; "When we," they said, "after the Carthaginians had been conquered, and Philip and Antiochus overthrown, came to Rome to congratulate you, we were escorted from the Senate House to the Capitol, bearing offerings to your gods." So when Perses married the daughter of Seleucus, the nuptials were celebrated by the congratulations and gifts of innumerable ambassadors, and solemnized, as it were, under the auspices of the noblest peoples. Such again are the embassies which princes send to the inauguration of kings, which the Roman Pontiff regards as so surely his due that a Pope, as Guicciardini writes, was indignant with a Catholic king, because he had not, after the custom of his ancestors, sent ambassadors to kiss his feet on his recent creation.

Secondly, embassies are ceremonial or honorary which are *consolatory*, and sent to sympathize in or to testify to sorrow; as when David sent ambassadors to Ammon, King of the Ammonites, to console him after the death of his father; and when the Athenians sent Ctesiphon to Cleopatra, the daughter of Philip, on the decease of Alexander, King of the Molossians. These embassies, unless prompt, are unwelcome; as is shown by the answer of Tiberius to the Trojans; for when they, after the death of Drusus, said that they had come somewhat late to offer him consolation, Tiberius, as though the memory of his sorrow was already obliterated, said, that he too mourned their misfortune in the loss of the noble Hector.

Thirdly, embassies which are designed to demonstrate feelings of friendship belong to this class; as when the ambassador of Chosroes, King of the Persians, presented to Justinian gifts and a letter which simply said that Chosroes desired to be informed of the health of the

emperor; and when Porus, an Indian king, sent a letter by ambassadors to Augustus, in which he declared that, though he was king over six hundred kings himself, yet he sought the friendship of Cæsar, and was ready to allow him free passage wheresoever he might wish, to gratify him by any means in his power, and so on.

These embassies have some particular and definite business for their object, like those other embassies which are sent to seek something which may be of public utility; as when the Decemvirs were sent by the Romans into Greece to seek the laws, which were afterwards reduced to the Twelve Tables; when Publius Gabinus, Marcus Ottacilius, and Lucius Valerius, after the restoration of the capitol, were sent as ambassadors to Erythræ to obtain and bring back the Songs of the Sybil; and when Ptolemy Philadelphus sent to Eleazer the High Priest of the Jews, to inquire into the Jewish law, employing seventy interpreters of the Sacred Books.

(3°) *Ordinary or perpetual embassies*, which may also be called *watching*, are those which have no precise or definite business as their object, but are undertaken for a period of time, and the persons who discharge them are commonly called residents; it is their duty, while they remain on embassy, to treat and act in everything which concerns the interests of the sender of the embassy, and to carry out his commands. Many persons believe that such embassies were unknown to the ancients; but they bear some likeness to those which were sent with proconsuls into provinces, and with generals into foreign countries.

(4°) *Extraordinary embassies* are those which are found necessary, according as affairs and business of state require them; and upon them civil conventions, treaties, and the like are discussed.

3.

Sometimes single persons, sometimes more than one, are appointed to undertake embassies, according to the nature of the business, or the rank of those to whom they are sent. The Roman custom was to send a single ambassador, but one of senatorial rank, to address or to recognize kings, and to bear them gifts. Other nations have usually sent more than one ambassador to those more powerful than themselves. Demetrius complained of the Spartans, considering himself slighted that they had sent only one ambassador to him; to which a Spartan replied, "Is not one to one enough?" To Alexander some nations sent a hundred ambassadors; the Sambasti, an Indian nation, fifty, the Scythians twenty, and the Amphictyons in the name of Greece twenty. Tigranes, who was accustomed to receive numerous embassies, said, scorning the fewness of Lucullus' soldiers, "If ambassadors, they are many; if foes, very few." But it has always, among all nations, been the custom that, among several ambassadors, one should be appointed chief of the embassy; thus, in the

embassy of King Philip to Hannibal, Xenophanes was the chief; in that of the Ætolians to the Romans, Phaneas; and in that of the Romans to Greece and Macedonia, Appius Claudius. His duty was publicly to deliver the message, to receive the reply, and with the advice and consent of the others to say whatever was to be said about the business intrusted to them.

Ambassadors are accompanied by a staff and household. The staff consists of persons of gentle condition, chosen by the ambassador himself, as Scipio Æmilianus, when the Senate sent him to the kings, chose his friend Lælius and the philosopher Panætius. Sometimes they are recommended by the sender of the embassy, as Anastasius, a literary man and librarian to the Pope, was added to the staff of his ambassadors by Pope Adrian the Second; and sometimes the staff is made up of persons who are considered likely to be acceptable to the person to whom the embassy is accredited, like the Armenians and Chaldeans who accompanied the ambassador whom Cyrus sent to the King of the Indians. In the household are the free persons and slaves whose services are necessary or useful to the ambassadors.

4.

The authority of ambassadors is derived from *letters of commendation* and *instructions*. *Letters of commendation*, which are commonly called letters of credence, or credit, are documents whereby the senders of embassies inform those to whom the embassies are accredited, that the ambassadors have been sent by themselves, and that they will ratify their acts. An *instruction* is an exposition of the will of the sender of an embassy on the business to be done; and is either *open* or *secret*. The object of an open instruction is that, if necessary, it may be produced to remove a doubt in the minds of those to whom the embassy is sent; and thereby either authority for some definite business is conferred on the ambassador, or absolute authority is intrusted to him, so that he may do anything that the interests of the state seem to require. Thus Phaneas and Damocles were once sent by the Ætolians to the Romans, with absolute authority honestly to determine on any course making for the public welfare; and so Charles, Duke of Burgundy, as Comines relates, gave his ambassadors absolute authority, by signing his name to a blank sheet of paper, to act as might seem expedient, and, if necessary, to show it to Louis the Eleventh, King of France, confirmed by the authority of his signature.

Secret instructions are instructions by which the manner and limits of the ambassadors' power to treat are secretly limited, and sometimes contain orders differing from those contained in their public instructions. Thus ambassadors sent by the Roman Senate under another pretext had in their instructions secret orders to break up the league of the Achæans; Gordian the Elder sent such instructions to Vitalian written on waxen

tablets and sealed up; and Hamilcar, when he was sailing with his fleet to Sicily, gave similar sealed instructions to the captains of his ships, with orders that none should read them unless driven by force of a storm from the course of the flag-ship. The consul Caius Marius conceived a like device in the Cimbrian and Teuton wars, when, in order to test the loyalty of the Gauls and Ligurians, he sent them a letter, the first part of which bade them not to open the latter part, which was sealed, until a certain date; and afterwards, on his demanding it back before the appointed time, and finding it opened, he understood that they were meditating hostility. On this wise then is the constitution of embassies.

5.

The *right of embassy* is that which should be rendered to ambassadors by those to whom they are sent, for instance, in the reception, audience, dismissal, and security to be accorded them. In the reception of ambassadors who come from a more powerful state, it is a usual observance for persons, even of high rank, to meet them on the way as a compliment or honor; thus Antiochus himself went to meet Tiberius the Roman ambassador; when the Emperor Justin, owing to illness, was unable to meet the ambassador of the King of the Persians, the empress went to meet him and received a letter from his hands; Charles the Great sent persons of high rank to receive the ambassadors of Aaron, King of the Persians, as soon as they touched land at Pisa; and such an honor is paid by many kings to the ambassadors of the Roman Pontiff, the kings going to meet them in person; though the King of France usually sends a brother or some prince of the blood to perform this duty.

The reception of ambassadors, further requires that hospitality should be provided befitting their rank, and necessities supplied to them. At Rome, when the city was still free, a quæstor was usually sent to meet the ambassadors of foreign nations, because, while they remained in the city, their expenses were voted from the public treasury. In accordance with this custom the quæstor Lucius Manlius went to meet Masgaba, the ambassador of Massinissa, and another quæstor met Masicanes, Massinissa's son. The custom is more fully explained in the reception of the kings Prusias and Ptolemy, who came to Rome in the character of ambassadors. When the Senate heard that Prusias, King of Bithynia, was coming to congratulate them after the overthrow of Perseus, they sent the quæstor Publius Cornelius Scipio as far as Capua to meet him, and resolved that the best house obtainable at Rome should be hired for him, and the wants supplied, not only of himself but also of his staff; and when Ptolemy, King of Egypt, after being robbed of his kingdom by his younger brother, came to Rome to ask for help, with a few slaves, and clad in rags, and betook himself to the hospitality of an Alexandrian painter, the Senate, hearing of it, sent for the young man, and made him

the most polite apologies for not having sent a quæstor to meet him according to their ancestral custom, nor having welcomed him with public hospitality; they declared that the omission was not due to carelessness on their own part, but to his own unexpected and secret arrival; and they forthwith escorted him from the Senate House to the public guest-chambers, and bade him doff his rags, and appoint a day of audience with the Senate; and they even made a point of ordering the quæstor to make him daily presents.

In the second place it is customary, at the request of ambassadors, to appoint a council, or a fixed day and place of audience, according to the rank of their persons and the nature of their business. Thus when the Achæans had deluded the ambassadors of the Romans with a long period of waiting, the Senate warned them, lest afterwards they should use excuses to cover their conduct, that Roman ambassadors should always have the right of audience in the council, in the same manner as the Senate was open to them whenever they wished. At Rome the Senate was open for the audiences of provincial embassies from the first of February to the first of March, in order that those who came from great distances might not be long detained; in the reign of Augustus three men of consular rank were appointed to give audience to these embassies; Tiberius gave them audience himself, attended by former governors of the provinces concerned. So too Trajan, of whom Pliny writes: "They are come and gone on the instant, and at length the crowd of embassies is excluded and the emperor's doors are no longer besieged."

Ambassadors were permitted to speak in their own tongue when they were heard in council, and to use the services of an interpreter; thus Cicero says: "Neither Carthaginians, nor Spaniards, nor any foreign nations, spoke in the Roman Senate without an interpreter"; and the Senator Cæcilius was given as interpreter to the three philosophers who came as ambassadors of the Athenians.

Thirdly, ambassadors, having delivered their message, have also a right to an answer. When the chiefs of the Achæans, after hearing the embassies of the Romans, of Attalus, of King Philip, and of the Rhodians, leave being given by the herald according to custom, refused to discuss their demands, Aristhenus, their magistrate, said:

"Chiefs of the Achæans, you lack counsel no more than tongues, but each of you refuses to discuss the matter at his peril. Perchance, were I a private citizen, I, too, should hold my peace; as prætor, I say that either an audience should not have been given to the ambassadors, or they should not be dismissed from it without an answer. But I can give no answer save by your decree."

Sometimes, however, an answer is not given to the members of the embassy, but transmitted through special ambassadors; thus Alexander gave no verbal answer to the ambassadors of Darius, who were sent to

him with a letter, begging for the release of his mother, wife, and children, but bade Thersippus carry a letter to Darius, in which he replied to the king's letter and the ambassadors' demands. Delay in giving an answer to a more powerful state is considered a contempt; thus, when Antiochus consented to receive the ambassadors of the Roman people, Popilius gave him a letter from the Senate to read through; the king read it, and then said that he would summon his friends and consult them, whereupon Popilius, who was a man of rough character, drew a line round the king with a cane which he carried in his hand, and said, "Before you leave this circle give me an answer to take back to the Senate"; and the king, overawed by the violence of the command, said, "I will do what the Senate desires." More excusable was the ruse of the Perugian ambassador, by which he suddenly elicited a reply from Pope Urban V. When the chief of the embassy had wearied the unhappy Pope by an interminable speech in introducing the business, and the Pope inquired whether they had anything else in their instructions, the second ambassador rose and said, "Most Holy Father, we are instructed that unless we forthwith receive an answer, our colleague here should address your Holiness with a speech of much greater length"; hearing which, the Pope immediately gave his answer and dismissed the ambassadors.

Finally, security should be afforded ambassadors by those to whom they are sent, as long as they remain in their territories, because the ambassadors represent the persons of their sovereigns. And not only is security due to the ambassadors themselves, but to their staff, household, and effects as well, for the staff and household are part of the embassy, and an ambassador's goods and chattels should be regarded as attached to his person.

III.

Thirdly, there is due between different princes or peoples a *right of civil convention*, by virtue of which they bind themselves, as do private persons, by contracting about some particular matter; as, for instance, when princes make an agreement with one another about a betrothal or marriage, which they sometimes do through proctors or special ambassadors, this, as Bodin remarks, being more frequently done by princes, who trust in pictures, than by reigning princesses, who prefer to look upon their consorts in person and to address them face to face. Thus Isabella, Queen of Castile, refused to marry Ferdinand until she had seen the prince's countenance; nor, as Bodin also mentions, could Elizabeth, Queen of England, ever be induced to promise her hand to any man whom she had not seen; so that when Henry, King of Sweden, sent a most persistent ambassador in the person of his brother John to ask her in marriage, she replied that she was deeply indebted to the king for having besought her to leave her prison for a throne, but she had resolved to wed no prince but one whom she was first allowed to see.

So, too, when princes bargain about a dowry or about the rights which are to belong to them by reason of a marriage. Thus it was agreed between Philip, King of Spain, and Mary, Queen of England, that, on the celebration of their marriage, Philip should assume the titles of his wife's kingdoms and provinces, and should be her consort in the administration of them, saving the privileges and customs of the realm, and also the full and free conferment of graces, favors, and offices, which was to remain with the Queen. In return, the Queen was to be the consort of her husband Philip in all his kingdoms and, if she should survive him, an annual pension of sixty thousand pounds was to be paid her by way of dowry; moreover, the children of the marriage were to succeed to all the kingdoms and dominions of the Queen, and to all the principalities of the Netherlands and Burgundy held by the Emperor; but Charles, the son of Philip by a former wife, was to inherit all his other kingdoms in Italy and Spain.

So, too, when princes bind themselves for other reasons to pay sums of money or to restore cities, fortresses, or other possessions. When Francis, King of France, was unable to cede to the Spaniards certain dominions, which, when a prisoner, he had promised to cede, because of the protestations of the estates of his realm, it was afterwards agreed by the Peace of Cambray that the Emperor should release the children of the French king who were hostages in Spain, and that the French king should pay to the Emperor two million crowns by way of ransom; and further that he should pay fifteen thousand crowns to Henry the Eighth, King of England, which the Emperor's father Philip had borrowed from Henry the Seventh when driven to England by adverse winds, and so redeem a golden lily studded with gems, in which a piece of Our Lord's cross was believed to be enclosed, which had been pledged to secure the debt, and have it restored to the Emperor.

So, again, when, in the year 1585, it had been agreed between Elizabeth, Queen of England, and the Estates General of the Netherlands, that the Queen should supply the United Provinces with five thousand footmen and a thousand horsemen, and pay their wages during the war, and that meanwhile Flushing, the fortress of Rammekins, and the island of Brill with its town and fortifications should be handed over to the Queen as security, James, King of England, when the debt, amounting to six hundred thousand pounds had been paid, restored the towns, the fortress, and the island with its fortifications, to the Estates of the Netherlands after thirty years.

Successors are bound to respect conventions of this kind, bound by law when the conventions have been entered into in the public interest, and otherwise bound in honor. Thus Francis the Second, King of France, wrote to the Swiss, when they claimed payment of his father's debts, that although he was not bound to pay his father's debts, since he

held the throne of France not by hereditary right but by the law and custom of the realm, which only bound him to observe those treaties or compacts which were contracted by his ancestors with foreign princes and peoples for the welfare and advantage of the kingdom, yet none the less, from a pious concern for the honor of his dear father, he had resolved to pay his just debts.

IV.

Fourthly, the *right of treaty* is that whereby princes or peoples bind themselves for some more general purpose and with greater solemnity; for the definition of a treaty is, as Livy tells us, a contract which binds a whole people by the command of the supreme power; specifically, it is, as Menippus says in Livy, a contract between those who are at peace with one another, in which those who have never been enemies join in friendship by a treaty of alliance. Among the Romans a treaty was usually made by "Fecials," headed by the "Paterpatratus"; and its object is something more general and lasting than that of other public conventions, as, for instance, friendship or alliance, or something which depends on friendship or alliance, such as commerce or assistance. For although friendship or alliance may sometimes exist on grounds of personal or real relationship, yet they are usually strengthened by the closer bond of a treaty or solemn contract; with others, with whom previously they did not exist, they are established; and in either case their limits and conditions are defined; and the assistance which is due under a treaty of alliance is determined more precisely and better than that which belongs to a mere alliance. For some treaties (which are called in Greek *ἐπικυαχίαι*) relate to alliance and assistance in defense; others (which are called *συμμαχίαι*) concern both defense and offense.

Further, as to their limits and conditions, treaties are either *equal*, when princes or peoples are under like obligations; or *unequal* when one is bound to do more than the other. Those who are joined in an equal treaty retain the dignity of their sovereignty absolutely unimpaired; of those who are subjected to an unequal treaty, the one is sometimes bound to recognize the other as his superior and to respect his sovereignty readily. Thus a treaty of alliance was concluded with the Ætolians in these words:

"Let the nation of the Ætolians guard the power and majesty of the Roman people without guile; let them have the same enemies as the Roman people, and bear arms against them, and wage wars with the Romans."

V.

Such *public conventions and treaties* sometimes rest on the good faith of the parties, and sometimes a solemn oath is added. Among the Persians to give the right hand was regarded as the strongest bond of

good faith; and this usage appears also to have been practised by the Romans; hence Cicero in the speech "Pro Deiotaro" said that the right hand of Caius Cæsar was as sure in pledging his word as it was in wars and battles. An oath is when God is invoked as witness and avenger; its sanctity has been supreme and from all time and among all peoples it has been of the greatest weight in engagements, promises, and contracts; thus Cicero says, "Our ancestors desired that no bond should be closer than an oath in order to insure good faith."

1. Paschal, chs. 35, 38, 39; Comines, *Commentaries*; Besold, on *Precedence*; Nolden, on *Nobility*, ch. 1, § 6; Lanquet, *Epistles*, 53; Arlanibæus, *Swedish Arms*, pp. 36, 39.
2. Conrad Braun, *Albericus Gentilis*, Kirchner, *Besold*, on *Embassies*, and the authorities by him referred to.
3. Bodin, VI, § 744; Conrad Braun, III, 14; Bodin, I, 8, § 91; 9, § 105; Godwin, *Annals*, 1585.
4. Bodin, V, 6; Ayala, I, 7; Lupus, on *Confederations*; Sigonius, on the ancient *Law of Italy*, ch. 1; Grotius, II, 15.
5. Grotius, III, 13; Bodin, V, 6.

SECTION V.

Of Wrong between those at Peace.

There is a wrong between those at peace when an injury is inflicted on persons, or when property is seized or carried off, or when duties arising by law, or under a convention or treaty, are not performed.

1.

A wrong between different princes or peoples is something by which community or peace is broken, and from which, as lawsuits arise from wrongs and injuries between private persons, so wars arise between those who have no judge. Among these wrongs the first is when status is wounded, or an injury inflicted on persons; and so Germanicus, when insulted by Piso, the proconsul of Syria, renounced his friendship; and Philip thought it a great indignity when the Athenians defiled his statues; and in the same way the Romans thought it a most audacious act when the Ephesians threw down their statues. The wrong is the same when injury is inflicted upon persons with whom we are closely connected; and so Agamemnon and the other princes of Greece made war on the Trojans because of the dishonor of the rape of Helen, the wife of Menelaus.

Moreover, it is also regarded as an injury if something is refused which should be readily granted on the score of humanity or friendship; as a right of passage through territory or rights of commerce; so Augustine maintains that wars were justly waged by the Children of Israel against the Amorites because the right of innocent passage was denied them; and the Greeks, as Plutarch relates, approved the complaint of the Megarians against the Athenians who excluded them from their harbors, contrary to the Common Law. And indeed it is also an injury if violence is offered to allies or help afforded to enemies; and so Quintius said to Nabis, the Tyrant of the Spartans: "You and your friendship and alliance with the Roman people I have not violated; then what things are a violation of friendship? surely these two above all, that you should hold my allies as enemies, and that you should unite with my enemies."

2.

Secondly, between different princes or peoples a wrong is committed when property is carried off or regions or territories occupied; so the Platæans, in Thucydides, say: "It is a law common to all mankind to take vengeance on those who plunder our possessions." And so the Romans harried the Ligurian brigands with war until Postumius had so thoroughly disarmed them that he left scarcely a share to till the ground with.

But the injuries are greater when dominions or kingdoms are invaded; thus Jephthah warred against the Ammonites for the purpose of protecting his territories; and it is recorded that the occasion of the Asiatic War was that the Romans, in accordance with the will of Attalus, had occupied a province which Aristonicus, a scion of the royal house, thinking it to be his right, claimed by force of arms.

3.

Thirdly, there is a wrong in time of peace when the right of conference or embassy is violated, or when the terms of a civil convention or treaty are not observed.

1. The right of conference is infringed by an injury or deception on the occasion of a congress or conference; as when Cornelius Asina, the Roman consul, being invited to meet the general of the Carthaginians in a pretended conference, was overpowered, a proof, says Florus, of Carthaginian perfidy; and when John, Duke of Burgundy, coming to meet Charles the Seventh, King of France, in conference, was murdered by some friends of the Duke of Orleans, who had great influence with Charles; a murder, says Comines, which afterwards led to the greatest calamities.

2. There is a wrong against the right of embassy in the following cases:

(1) If admission is refused to ambassadors; thus, when Hannibal was besieging Saguntum, and the arrival of ambassadors from Rome was reported, he sent men to meet them at the sea and inform them that it would be unsafe for them to come among the arms of so many nations, and for himself he had no mind to listen to embassies at such a critical moment. Hanno eagerly seized on this incident, and bitterly attacked him in the Carthaginian Senate: "Ambassadors," he said, "sent by allies and for allies, your noble general refused to admit into his camp; he has trampled on the Law of Nations; yet though driven from the place whence not even the ambassadors of an enemy are excluded, they come to you." A similar action of Perseus the Senate treated as a declaration of war; Roman ambassadors, sent into Ætolia and Macedonia, were informed by some that Perseus was absent, by others that he was sick, both stories being equally false; and they reported themselves that no opportunity of meeting the king had been afforded them.

(2) If ambassadors are treated with contempt; as when the ambassadors whom David had sent to Hanun, King of the Ammonites, to sympathize with him after the death of his father, were sent away with half of their beards shaved off, and their garments rent to the middle; in consequence of which David pursued Hanun and the Ammonites with bitter war; and when Marius Acilius, the Roman ambassador, was captured by Mithridates and exposed to ridicule; and when the Corinthians showered dirt upon the ambassadors of the same people as they passed.

(3) When haughty answers are returned by inferiors or equals; thus, when ambassadors came from the Romans to Aquilius Gracchus, the commander of the Æqui, to complain of injuries and to demand the restitution of property under a treaty, he bade them deliver the message of the Roman Senate to an oak-tree, for that he had other business to do. An answer of this kind given to Caius Fannius, a Roman ambassador, was the cause of the Dalmatian War, which Scipio carried through; for when Fannius had come to complain of the murder of the ambassadors of some neighboring tribes, the Dalmatians refused to hear him, alleging that they had nothing to do with the Romans.

(4) If ambassadors are beaten; for if one strikes an ambassador, it is deemed an offense against the Law of Nations, says a jurist; and so when the ambassadors of the Laurentines had been struck by the kinsmen of King Tatius, and Tatius himself had not punished them, the crime became his own.

(5) It is a far graver wrong to put an ambassador to death. Accordingly, when Tolumnius, at whose instigation the Roman ambassadors had been killed by the people of Fidenæ, had been conquered in battle by Cornelius Cossus, Cossus attacked him in these words: "Behold the breaker of the treaty of mankind, the violator of the Law of Nations; now will I offer this victim for the sacrifice, if the gods but will that ought should be sacred upon earth, to the shades of the ambassadors." And Leptines, who had killed a Roman ambassador, was sent to Rome by Demetrius with Isocrates, a grammarian, who had instigated the murder. When the Senate sent ambassadors to the Senonian Gauls to complain that they, who were allies of the Roman people, were serving the enemies of the Roman name, Britomaris, a Celt, remembering that his father had been slain when serving among the Roman auxiliaries, cut up the ambassadors into small pieces and had the pieces scattered abroad throughout the fields, a crime which the Romans afterwards avenged on the Gauls with the utmost severity.

Sometimes, however, it is the ambassadors who commit a wrong against those to whom they are sent. Thus,

(1) They sometimes bear themselves in a too insolent manner; so Lucius Annius Setinus, an ambassador sent to Rome by the Latins, spoke in the Roman Senate more like a conqueror who had captured the Capitol by arms than an ambassador protected by the Law of Nations; for which cause the Senate resolved on war against the Latins; and when the Tigurini and the Helvetii sent an embassy to Cæsar to discover whether terms of peace could be agreed on, and Cæsar demanded hostages and money from them, they replied that it was their custom to accept, not to give such terms—insolence that so enraged Cæsar that he at once sent Labienus against the Tigurini and himself moved against the Helvetii.

(2) When ambassadors commit some act of indecency or offend against the law of hospitality; as the ambassadors sent by Megabazus the Persian, to Amyntas, King of Macedonia, who, after obtaining the object for which they had come, were hospitably entertained at a royal banquet; but becoming heated with wine and good cheer, they treated the royal ladies with gross indecency; which so incensed the son of Amyntas that he caused some youths armed with swords and dressed in women's clothes to take the places of the ladies, and when the envoys essayed to treat them with the same freedom, the youths drew their swords and put them to death.

(3) When ambassadors plot the destruction of those to whom they are sent; thus when Pelopidas was trying to bring Thessaly under the power of the Thebans, and thought himself protected by the right of embassy, which all nations usually respected, he was seized by Alexander of Pheræ, together with Ismenias, and thrown into prison; and when Attila, King of Scythia, discovered from many suspicious circumstances that Bigila, the interpreter of the ambassador Maximinus, had been set to murder him, he ordered Bigila's son, who had come with his father on the embassy, to be run through with a sword, if the father did not immediately confess the scheme of treachery; whereupon he, without a moment's delay, discovered the whole plot, and begged the king to release his son, and turn the sword upon himself. Accordingly he was thrown into prison, until a large sum of money, which the son was sent to fetch, was paid to expiate the crime and to buy his freedom.

4.

Fourthly, there is a wrong concerning civil convention when an agreement between princes or peoples is not kept. For instance when the Regent and Peers of Scotland had solemnly promised that the infant Queen Mary should marry Edward the Sixth, King of England, who was still a boy, if both should consent when they came to years of discretion; and afterwards, to oblige the King of France, had betrothed her to the Dauphin, contrary to their pledged word; the Protector of the King, and the Peers of England, being incensed, made war on the Scots and inflicted a severe defeat upon them, many thousands of them being killed in battle and their chief nobles captured, among whom was one Huntly, who, when asked whether he now approved of the proposed marriage of King Edward with Queen Mary, replied that the marriage did not displease him, but he certainly could not approve the means by which it was sought to bring it about.

It is likewise an offense against a convention when falsehood or trickery is used in the matter of promises or obligations; as when the Greeks owed a certain number of ships to the Phœnicians, and gave them ships without rudders, sails, and oars. Comines tells how the Duke of

Milan evaded a promise by a similar piece of trickery; the Duke admitted to him that he had promised to supply a certain number of ships to the King of France by way of aid, but not for him to embark French troops upon them; to which Comines replied that this excuse was as if one should lend a man a mule to cross the Alps, and meantime bid him lead it on foot, and not allow him any other use of it. There is, however, no cause of complaint when those are deceived who trust to a light or ambiguous answer in a grave and serious matter. It was in this way that a French ambassador misled himself and his master; for after the death of Francesco Sforza, he asked the Duchy of Milan, in the name of his king, from the Emperor Charles the Fifth, and the emperor replied that what pleased his brother, the King of France, pleased him. The ambassador, thinking that Charles had by these words signified assent, immediately informed the king to that effect; whereas Charles really meant that the Duchy of Milan pleased him no less than it pleased the French king, and that he intended to show as much zeal in holding it himself as the French king had shown in claiming it.

Finally, there is also a wrong in time of peace when an act is done which is contrary to a civil treaty; as when the state of Caryæ, in the Peloponnese, forgetting the liberties of its country and its sacred treaties, supported the Persian enemy against Greece. The Greeks, after the victory was won, by common consent attacked the people of Caryæ, put the men to the sword, rased the city to the ground, and carried off the women into slavery. And when, during the war with Fidenæ, the Albans, who had been sent under a treaty to help the Romans, waited for the issue of the day midway between the two armies, Tullus Hostilius, who had frustrated the treacherous design by a victory over the enemy, caused Metius, their chief magistrate, the breaker of the treaty, to be bound between two chariots and torn asunder by spirited horses. So, too, Iliturga, a city of Spain and formerly friendly to the Romans, having betrayed to the Carthaginians the remnants of Scipio's army who fled thither as to friends, was stormed by Scipio the Younger and rased to the ground, even the women and children being put to the sword.

5.

Lastly, in these cases the danger of a wrongful act is more serious when faith is violated or the sanctity of an oath disregarded; for it is a serious thing to break faith, the foundation of all justice, whereby not only states are bound together, but all human society; and because perjury is more hateful even than atheism, since perjurers appear to recognize the Deity, but dare to mock Him.

1. Bodin, *V*, 6; Gentilis, *I*, 13, and following chapters; Grotius, *II*, 1, § 5. 2. Florus, *II*, 3, and 20. 3. Comines, *Commentaries*, *IV*; Braun, *Paschal*, *Besold*, on *Embassies*. 4. Hayward, *History of Edward VI*; Gentilis, *II*, 4; Comines, *Neapolitan War*, book *IV*; Ayrault, *Decrees*, on *Embassies*, and on the *Lex Julia Majestatis*; Bodin, *V*, 6. 5. Grotius, *II*, 13; Bodin, *V*, 6.

SECTION VI.

Of the Law of War.

War is a lawful contention between different princes or peoples, and is either formal, that is, declared and waged by a state; or informal and reprisals, which are practised by private persons. The law of war also regards status, ownership, duty, and wrong between belligerents.

1.

War, like peace, is contained in the Law of Nations. War is a lawful contention, that is, a contention moved by a legitimate authority and for a lawful cause. A legitimate authority is a supreme authority; so Augustine says: "Natural order requires that the authority to undertake a war should be with princes." A lawful cause is an injury which it is allowed both to avenge and to repel; whence a war is said to be either of offense, or of defense; as Camillus in a declaration to the Gauls said, "All things which heaven allows us to defend, it allows us to reclaim and to avenge."

War, again, is either formal or informal. That is formal which, after being duly declared, is waged by a state. Of *declaration*, Cicero in the first book of the "*De Officiis*" says:

"The equity of war is prescribed in the most binding form by the feacial law of the Roman people; whereby it may be seen that no war is lawful, except one which is preceded by a demand for the restitution of property or by a proclamation and declaration."

Livy thus records the formula of declaration: in the presence of three Romans of full age, the Feacial uttered the following words:

"Whereas the people of the ancient Latins have done and offended against the Roman people, and whereas the Roman people of the Quirites have resolved, agreed, and decreed that war be made on the ancient Latins; now therefore, I and the Roman people hereby declare and make war against the peoples of the ancient Latins."

Having said which, he hurled a spear into the territory of the enemy.

War is waged by a state, when the arms are the property of the state and all citizens are exposed to the dangers of war.

2.

Informal war is that which is undertaken by private persons, and of such war there were among the Ancients two forms, ἀνδροληψία and ἐνεχυρασμός. About ἀνδροληψία, or seizure of persons, the law of Attica was that if a man met death by violence, his kinsmen and friends had a right to seize persons, until either punishment was inflicted for the murder, or the murderers were given up; but three persons only and no more might be seized; which according to Julius Pollux must be understood to refer to cases in which the murderers fled to some other people, and were not given up on demand.

Like this is the custom, in order to recover a citizen who has been imprisoned in an obviously wrongful manner, of detaining citizens of the offending state. And for this reason certain Carthaginians prevented the imprisonment of Aristo the Tyrian, fearing that the same thing might happen to themselves at Tyre and other marts which were frequently visited by Carthaginians.

Ἐνεχυρασμός, or Pignoratium, is when, between different princes or peoples, on account of a denial of justice, a right of seizing goods by public authority is granted to private persons; and this is commonly called reprisals. Justice is held to be denied, not only if judgment can not be obtained against a guilty person, or a debtor, within a reasonable time, but also if in a clear case a judgment is given which is obviously contrary to law, since the authority of the judge has not the same validity against foreigners as against subjects. There is an ancient example of this right in Homer, where Nestor, on account of the theft of his father's horses, is said to have seized the flocks and herds of the people of Elis; and in Roman history in the incident of the Roman ships which Aristodemus, the heir of the Tarquins, detained at Cumæ in revenge for the property of the Tarquins.

1. *Ayala and Gentilis, on the Law of War; Belli, on Military Affairs; Grotius, I, 1; II, 22, and 23; Gentilis, III; Grotius, III, 8.* 2. *Bartolus, de Lodi, Dalner, degli Cani, on Reprisals; Grotius, III, 2, §§ 2, 3, 4, etc.*

SECTION VII.

Of Status among Belligerents.

Status among belligerents is their condition among themselves in regard to military government, which is a government either of Military Domination, or Preëminence, or Protection; or their condition in regard to others, which makes them to be regarded either as "Unfriendly persons" or as "Enemies."

1.

Community between nations is concerned not only with civil rule or government, to which peoples voluntarily and of their own accord submit themselves, but also with military government, which is established by force and arms, and by the sight of force and arms. In the first place this government may be one of domination, whereby peoples and nations are reduced to slavery through a victory. Such was the first Asiatic Empire, which Aristotle, who regarded the peoples of Asia as barbarians, calls the barbarian ἀρχὴ δεσποτική, or the rule of masters, to which the inhabitants of Asia, in accordance with their innate customs, submit themselves more readily than Greeks and Europeans. Its origin is referred to Ninus, of whom Justin says:

"In more ancient times, kings waged distant, not neighboring wars, and sought not empire for themselves, but glory for their peoples. First of all Ninus, King of the Assyrians, changed the old, and, as it were, ancestral custom of nations into a new lust of empire; he it was who first made war on neighbors and subjugated the peoples, as yet untrained to resist, as far as the boundaries of Lybia. By continuous possession he confirmed the greatness of the domination which he had won, and when with a fresh accession of force he passed on stronger than before to others, each new victory was the instrument of its successor, until he subdued the peoples of the whole East."

In the Holy Scriptures he is called Nimrod, that is to say, the Terrible Lord, and is distinguished as a most mighty hunter, that is to say, a Robber, because he reduced free men to slavery. Afterwards when Cyrus transferred the monarchy of the whole of Asia from the Assyrians and Medes to the Persians, the right of domination was much relaxed; for Cyrus bade the conquered Assyrians be of good cheer, for that their lot would be the same as it had been, but for the change of king—their homes, and lands, their right over wives and children would remain as

they had always been. Laws were even passed under this empire to bind the princes no less than the peoples. Kings, however, were held in great veneration; so Plutarch relates that when Themistocles wished to meet the King of the Persians after the Greek custom, Artabanus, the captain of the guard, thrust him back and would not suffer him to address the king until he had first performed adoration; but later, when he had left the palace, he addressed him kindly and excused his conduct in these words:

“To every man, Themistocles, the manner of his own nation is admirable; you Greeks have ever embraced liberty and equality; whereas we deem nothing so natural or so becoming as to adore and reverence the majesty of our king, as the image of Almighty God on earth.”

2.

Government of preëminence is where conquered peoples are held under the power of a stronger, and in obedience to him, in order that they may not injure him and may serve his interests. Such a government was established by the Greeks and Romans; thus Isocrates advised Philip to subdue the Barbarians just so far as should be sufficient to place his own territory in safety; the Spartans originally, and the Athenians, claimed no government for themselves over captured states, but merely required them to adopt a constitution modeled on their own—the Spartans one under the power of princes, the Athenians one under the will of the people. Agesilaus, as Xenophon relates, exempted all the states which he brought under his own power from the services which slaves perform for masters, and exacted only the obedience of men to rulers. After his victory over Darius, Alexander on several occasions offered him these terms, that he should rule others, but be subject to Alexander.

Of the Romans, Sallust says: “Our ancestors, who were the most devout of men, robbed the vanquished of nothing but the freedom to injure”; and in another passage, “The Roman people thought it better to seek friends than slaves, and safer to rule over willing than over reluctant subjects.” And so Quintius, when the Ætolians declared that peace could never be secure unless Philip of Macedon were driven from his kingdom, said that in urging this view they had forgotten the custom of the Romans to spare the conquered; and he added that towards the conquered every great man has a merciful mind. That the Romans allowed conquered kings to govern is testified by Tacitus, who says it was a custom of the Roman People to have even kings as instruments of slavery, and he calls Antiochus the richest of the servile kings.

These, however, were perhaps exceptional cases of clemency. Ordinarily the Senate, on being informed of a victory by a letter from the general who brought the war to an end, empowered the general himself by decree, and either ten or five others chosen from among the Senators,

to organize the conquered territory and people. These persons arranged the states in prefectures, and the territories in provinces, according to their deserts—states which had been ungrateful to the Roman people and had more than once broken their pledged word, when brought under Roman power and control, were reconstituted as prefectures; of which Festus says, that justice was administered in them and markets were held, and in a sense they were free states; but they had no magistrates of their own, and prefects were sent to them by law each year to administer justice. The first prefecture was Collatia, instituted as far back as King Lucius Tarquinius Priscus; and Livy says that, after it had surrendered, it was not received into allegiance with the same clemency as the hostile peoples of Crustumium and Nomentum, but was deprived of its arms, and fined, and also ordered to receive a prefect and garrison.

Territories were reduced to the form of a province when the laws of the country were abrogated or new ones introduced at will, and a prætor appointed each year by the Roman Senate had charge of the administration and government of the State, with an army in case there should be reason to go to war. In this way first Sicily was formed into a province, then Sardinia, thirdly Cisalpine Gaul, and finally Transalpine Gaul and Britain by Cæsar.

3.

Government of protection or beneficence is that which binds those who have received military fiefs or *benefits* from a prince to render military homage. Such was the government of the Lombards introduced by the northern peoples of Germany, who drove out the former inhabitants and settled in that part of Italy which was called Cisalpine Gaul. They refused to submit to the power of the German emperor, and lived free, and under their own laws; and their princes, keeping for themselves the chief places and those prerogatives which are called royal, granted dignities and estates to persons of warlike aptitude, in return for fealty and military services. Among them the grantor of the fief or *benefit* was called the *patron* or *senior*; those who received it, *vassals*. Some fiefs, which were held by the *greater valvasores*, carried with them dignity and jurisdiction, such as duchies, marquisates, and earldoms; others, which were held by the *lesser valvasores*, carried jurisdiction only; and below these two were simple estates, which were held by *valvasini*. Their system was not unlike that which Lampridius mentions in speaking of the Roman Emperor, Alexander Severus. He granted estates, captured from the enemy, to *frontier* generals and soldiers, on the terms that they should belong to the grantees provided that their heirs rendered military service, saying they would serve the more keenly, if they were also defending their own. This custom the German emperors, after they recovered Italy,

not only retained, but further extended; for Frederick, Conrad, and others, observing that some of the magistrates in the East had usurped the sovereignty of provinces, and others, in the hope of ampler wealth and dignities, had acted in collusion with the enemies of the emperors, granted dignity and rights of administration, and even the revenues of the same provinces, to persons of proved character and their heirs, under the like conditions of fealty and military service. The origin of military homage or service is derived by some writers from the customs of the Germans (from whom the Lombards sprang), of whom Tacitus relates that their princes maintained a vast retinue of followers whom they supported by war, and hired for war. Their chief oath was to guard and defend their prince, to attribute even their own brave deeds to his glory; and they held it lifelong infamy and shame to outlive their prince on the field of battle.

4.

The condition of princes or peoples who are at strife or contention with others is that which causes some to be regarded as *unfriendly persons* and others as *enemies*. Those are *unfriendly* with whom there is no friendship or legal intercourse, as *aliens* and *adversaries*. Aliens were called by the Greeks *barbarians*, and by the Romans *peregrini*, and if injury or damage was done them they had no legal remedy; so that, as regards some of the effects of war, they appeared to be in the position of enemies. Thus a jurist says: "If we have neither friendship, nor rights of hospitality, nor treaty of friendship with a nation, they are not indeed *enemies*, but anything of ours which comes into their hands becomes their property, and the same if anything of theirs comes to us." But we no longer, says Bodin, observe this rule, because we recognize a common humanity between man and man.

Adversaries, again, are those with whom friendship or legal intercourse has existed, but has been dissolved, for example, by civil dissension. Thus Cæsar very frequently calls the Pompeians *adversaries*; and a jurist says of them:

"Civil dissensions, although they do injury to the state, yet do not aim at its destruction, and those who take one side or the other are not enemies, governed by the laws applying to enemies."

5.

Enemies proper are those whom it is lawful to offend and destroy utterly; some of whom are of a worse and others of a better condition. Of the worse condition are those to whom the laws of war do not apply, such as *traitors* and *robbers*. *Traitors* are those who have taken up arms against their prince or commonwealth with hostile intent, and include *rebels* and *deserters*, who have revolted from the prince to

whose government they were subject. *Robbers* are those who go about in the manner of enemies without the authority of a state, as *brigands* on land, and *pirates* at sea. Those were brigands, who infested the provinces of Cisalpine Gaul, and were harried by Crassus, but they had no leader of sufficient mark, and were neither notorious nor numerous enough in themselves to be called *enemies* of the Roman people. Among pirates were the Cilicians, who, breaking the treaty of the human race and destroying commerce, swept the seas with war, like a tempest, as Florus says, and were first checked by Servilius, and afterwards utterly crushed by Pompey.

Lastly, lawful enemies are those to whom are due all the rights of war; whom Ulpian defines in these words: "Enemies are those against whom the Roman people has decreed war, or who have decreed war against the Roman people"; and Cicero says of them: "An enemy is one who has a State, Senate, Treasury, citizens consenting and agreeing, and some method of making peace or war, if occasion requires."

1. Aristotle, III, 10; Justin, book I, at the beginning; Bodin, II, 2. 2. Grotius, III, 15; Sigonius, Law of Italy, book XII, ch. 11; and book I, last chapter. 3. Hotman, Feudal Terms, 'patronus,' and 'Langobardia'; Treatise on Fees, ch. 1; Tacitus, Germania. 4. Hotman, Famous Questions, 7; Bodin, I, 7, § 69; Gentilis, I, 4. 5. Ayala, I, 2; Grotius, III, 3, § 1.

SECTION VIII.

Of Ownership among Belligerents.

Ownership among belligerents arises when single things and persons are brought under control by capture, or recovered by "postliminium"; and when all the possessions of a people pass into ownership by surrender or victory.

1.

"The Law," says Aristotle, "is a sort of general agreement, whereby things captured in war become the property of the captors"; and the jurist Gaius says: "Things which are captured from enemies immediately become the property of the captors, with the result that even free men are reduced to slavery." But as to persons captured in war, although by the ancient Law of Nations, which permitted them to be put to death, they were reduced to slavery, among Christians it has become the custom merely to detain them until the price of ransom has been paid, at the will of the captor, unless a fixed sum has been agreed upon. Now in war some acquisitions become the property of private persons, others of the prince or people. To private persons belong things which are captured in a private action done on the occasion of a public war, such as spoils stripped from an enemy in single fight and the winnings of soldiers when they are away from the army upon independent and voluntary expeditions; the Italians call this form of booty *correria*, and distinguish it from *butina*. Something similar to this is allowed to sailors on active service; the French call this *pillage* or *spoliation*, and include therein clothes, silver, and gold up to the value of ten crowns. To the prince or people belong things which are captured in a public and general act of war, because in this each man bears the character of the State. So Aristides guarded the booty captured at Marathon; and after the battle at Platæa it was strictly enjoined that no man should take any of the booty for himself. Such booty, however, generals sometimes give up to their soldiers to pillage indiscriminately, and sometimes to divide. Indiscriminate pillage is allowed either in a sack, or after a battle or a storming, the soldiery scattering to the work at a given signal. Thus Tarquin gave Suessa to his soldiery to pillage, the dictator Quintus Servilius the camp of the Æqui, and Camillus the city of Veii. Booty is divided either in proportion to pay or to deserts; Appius Claudius ordered it to be divided in proportion to pay, one share to a foot-soldier, two to a centurion, three

to a horseman. Deserts too were often considered; for instance, for his brave conduct Marcius was rewarded by Postumius out of the booty of Corioli. But whatever the method of division, generals used to reserve some conspicuous object for themselves; thus Livy says of Tarquin, that he wished both to enrich himself and to win the favor of the populace with the booty.

2.

Postliminium, as defined by the jurist Paulus, is the right of recovering something lost from a stranger, and restoring it to its former status, established by customs and laws among the Romans and other free peoples and kings. The right applies to capture by strangers, that is, those with whom open unfriendliness exists, as between the Romans and the Germans and Parthians, or those against whom war has been declared; for among them, says Ulpian, captives become slaves, and when captured from them they recover their former status by *postliminium*. On the other hand the right has no application to capture by robbers or in civil dissensions, for there the captors are not *enemies*, among whom exist rights of capture and of *postliminium*. The right extends to persons of every class, but to some things only. Of persons, Paulus says:

“There is *postliminium* for persons of whatever sex or condition; for not only are those who can fight recovered by *postliminium*, but also all persons who may be useful either in counsel or in other ways, and even slaves when recaptured by the bravery of soldiers are restored to their masters.”

For “we ought to regard them as having been recaptured, not captured, and our soldiers should,” say the Emperors, “be their defenders, not their masters.” But for deserters, says Paulus, there is no *postliminium*; for he who leaves his country maliciously and with treacherous intent is to be regarded as an *enemy*. Nor again do those who have surrendered to the enemy after a defeat enjoy *postliminium*; and, as Pomponius says, “if a captive whose return is provided for in a peace voluntarily remains with the enemy, he loses the right of *postliminium*.” Nor, as Florentinus thought, is a physical return without the intention to remain enough; accordingly an opinion was given that Attilius Regulus, whom the Carthaginians sent to Rome, had not returned by *postliminium*, because he had sworn to return to Carthage and had not the intention of remaining at Rome. It makes no difference, however, in what manner the captive has returned, whether he was released, or escaped from the power of the enemy by force or by fraud. And, it is enough for *postliminium*, says Paulus, if without actually entering our territory a man reaches an allied or friendly state or king, because there he first begins to be protected by the name of the state. The effect of *postliminium* is

that a man recovers not only his status, but, according to Pomponius, on his return all his rights are restored as though he had not been captured by the enemy.

As regards captured things, in the first place immovables, such as lands and estates, are recovered by postliminium; since, as Pomponius says:

“It is true that when the enemy has been expelled from lands which they have occupied, the ownership of those lands reverts to the former owners, nor ought they either to be confiscated or treated as booty.”

With this also agrees the rule that sacred or religious places captured by the enemy cease to bear that character, but if released from this calamity their character reverts, as though they were returned by a sort of postliminium.

Secondly, certain movable things also, designed for use in war, are recovered by postliminium: Thus Marcellus says:

“There is postliminium for ships of war and merchant ships because of their use in war, but not for fishing-smacks or light pleasure-boats. A horse too, or a mare, if broken, is recovered by postliminium.”

But it is said that arms do not revert by postliminium, because their loss is disgraceful and an offense, and Pomponius says the same is true of clothes.

3.

Further, universal ownership over things and persons, that is to say, over territories and peoples, is acquired by surrender and by victory. A *surrender* is when a people yields to the power of another what otherwise seems likely to be seized by force of arms; thus the peoples of Syria, Mesopotamia, Lybia, and Cilicia yielded themselves and all that they had to Nebuchadnezzar. “All our state,” say they, “all our mountains and hills and plains, our herds of cattle, flocks of sheep, goats, horses and camels, all our stores and households are in thy view, let them all be subject to thy law; ourselves too and our sons are thy slaves.” So the Falisci addressed the Romans by ambassadors in the Senate: “We are your subjects; send to receive our arms, our hostages, our city with its open gates; you will have no cause to reproach our loyalty, nor we your dominion.”

The Campanians, again, made their submission to the Romans in the following words:

“The Campanian people, the city of Capua, our lands, temples and all our possessions, divine and human, we surrender into your hands, Conscript Fathers, and into the hands of the Roman people; henceforth for weal or for woe we are your surrendered subjects.”

The effect of a surrender of this kind is, according to Livy, that a superior in arms, to whom everything has been surrendered, may decide

at will what he, as victor, will take, and what the others are to forfeit. A decisive victory is when the enemy suffer a defeat by which an end is put to a war, and as a result of which their cities, lands, and territories pass into the dominion of the victor. So when the envoys of the Volsci, at the instigation of Coriolanus, asked back the cities captured by the Romans, they met with this reply:

“ If you had surrendered your towns to us, and afterwards repenting asked them back, assuredly it would be a wrong that you should not recover them; but as you have been deprived of them by right of war, since you have no longer any dominion over them, you do wrong to seek after what belongs to others. We hold our most legitimate possessions to be those which we have won by our victorious arms; we were not the first to establish this law, and we deem its origin as much divine as human; and as we know that all men, Greeks and barbarians alike, respect it, we will not weakly relax a tittle of it. For it would be a grave offense to lose by cowardice and folly what we have won by bravery and fortitude.”

4.

So the Romans by arms and the sight of arms held territories and their peoples in subjection for the benefit of the State, by three titles, *proprietary*, *subsidiary*, and *dependent*. Territories and their peoples passed into the power of the Roman people by proprietary title when they were received into the dominion of the Roman Empire, and when the peoples of that Empire were transplanted into conquered territories. Of the first method Livy says that Rome grew by admitting her foes to citizenship; and Seneca says: “ What to-day had been the Empire if a salutary statesmanship had not mingled the vanquished with the victors? ” And Claudius says, in Tacitus: “ Our founder Romulus was so exceedingly wise that many peoples were enemies and citizens within a single day.” Indeed, after a fierce battle with the Sabines, who had invaded the city on account of the rape of their virgins, a peace was made with their King Tatius, and “ there followed,” says Florus, “ a wonderful thing; leaving their own homes, the enemies migrated to a new city, and shared their ancestral wealth with their daughters’ husbands as a dowry.” And Tullus Hostilius, after the destruction of Alba, transferred all the wealth of the city, and the people themselves, to Rome, simply, according to Florus, that a kindred state might not appear to have been destroyed, but restored to the body whence it sprang.

So after the utter defeat of the Latins, Camillus gave his advice in the Senate:

“ You may establish eternal peace with the Latins, either by wreaking your vengeance upon them or by sparing them. Would you deal cruelly with the surrendered and the vanquished? You may destroy all

Latium, and make vast solitudes of the places whence in many a hard-fought war you have drawn a splendid army of allies. Or would you, after the manner of your fathers, exalt the fortunes of Rome by receiving the vanquished into your state? The means of growing ever more and more glorious are in your hands. Assuredly the strongest of all empires is that which subjects delight to obey." And so on.

To the latter method Gellius refers when he says that colonies are states from the stock of the Roman state; for Romulus, as Dionysius says, neither destroyed nor enslaved the towns which he captured in war, but as a rule sent out colonies from Rome into the territory captured from them; the example of Romulus was followed by the other kings, by the Senate and people after the expulsion of the kings, and by the emperors after the decay of the authority of Senate and people. Sigonius enumerates from the old annals six reasons for this most prudent institution; to hold the former peoples in check, to crush the invasions of enemies, to increase the population, to drain off the urban populace, to avoid sedition, and to bestow rewards on veteran soldiers.

5.

Territories were held by subsidiary right, which were bound to supply a more powerful state with necessities, such as soldiers, money, corn, and the like. Thus the Romans were able to demand soldiers from those races of Italy with whom they entered into a treaty of peace, as well as from the provinces. Of these Polybius writes as follows:

"Throughout the same period the magistrates of consular rank issued edicts to the governors of the allied states in Italy from whom they thought fit to require help, indicating the number, the day and place of meeting of the levies; and the states, by a similar edict, held a levy and sent forth sworn soldiers, with their appointed commander and paymaster."

An annual tribute of money was imposed on the provinces, of which Petilius Cerialis in Tacitus, speaking for the Romans to the Gauls, said:

"Notwithstanding our many provocations, we have by right of victory laid upon you this burden alone, in order to guard the peace; for there can be no peace without arms, no arms without pay, no pay without tribute."

Lastly, in order to insure the corn supply, the farmers in the provinces were bound to give a tithe of their produce without payment, and to sell what was bought at a price fixed by decree of the senate at Rome.

6.

Free peoples are in subjection by right of *clientship* or dependency, who have bound themselves to loyalty and homage for the sake of protection. Thus when there were two factions in the whole of Gaul,

those of the Ædúi and the Arverni, other peoples who adhered to one or the other of these Cæsar calls *clients*; and of the peoples and nations who were *clients* of the Romans, Tacitus says that they had a *reverence* for the Roman empire; and Florus says of them: "Others, too, who were outside the empire, yet felt its greatness and revered the Roman people as the world's conquerors."

So when the Campanians were asking protection of the Romans, they said: "None of your colonies will excel ourselves in homage and loyalty towards you; the service which you render us for our safety, we will ever return for your empire and glory." *Clients* differ from *vassals* in this respect, that *vassals* are under the dominion and sovereignty of a supreme lord, whereas princes and peoples who are *clients* of others, are not under their sovereignty. Thus the jurist Proculus says: "We regard our *clients* as free, although neither in authority, nor dignity, nor in any of their rights are they our equals."

1. Grotius, III, 6, § 12, etc. 2. Digest, XLIX, 15; Code, VIII, 51. 3. Arnisaeus, I, 3. 4. Grotius, III, 15, § 3; Sigonius, II, 2. 5. Rosinus, X, 4, and 22. 6. Arnisaeus, I, 4, §§ 3, 6, 7.

SECTION IX.

Of Duty between Belligerents.

Duty between belligerents is what we ought to render to those with whom we are at strife or war, as the rights of Military Congress, Embassy, Convention, and Treaty, which are sometimes assured by the giving of hostages or real security.

1.

A *military congress* is when princes or the generals of a war meet in conference or in battle. They meet in conference in the hope that, after reasons on one side and the other have been advanced, the disputes may perhaps be settled. Thus Eumenes and Ptolemy are said to have met in conference; Seleucus and Demetrius met at Orossus, Lucullus and Pompey at Damula; and Cæsar, Antony, and Lepidus, leaving their armies behind them, met at the bridges over the river Lavinius, near the city of Bononia. On their arrival at this spot, after a thorough search had been made of the island which lies there, Lepidus gave the signal with his cloak, and thereupon they entered the island, and leaving three hundred men, together with their friends, at the bridges, they advanced to the center of it and stood in an open field, Cæsar, as imperator, in the middle. Princes meet in battle in order that controversies may be terminated by the issue of victory; and sometimes they themselves engage in single combat; sometimes they decide the issue by an agreed number of soldiers on either side; but most often they submit their quarrels to be determined by contests between the armies.

(1) Of single combat between princes Agathias relates that it was a custom among the Franks, if any quarrels arose between kings, for all to line up in battle array, as though about to decide the issue by war; but when the armies sighted one another, they would suggest to the kings that they should rather fight it out at law, or if they refused, that they should settle the matter by single combat between themselves, and at their own risk only. For it accorded neither with justice nor expediency nor the customs of the country, that they, to gratify their personal enmities, should shake and destroy the interest of the state. So in olden days Hyllus and Echemus contended for the Peloponnese; Hyperochus and Phemius for the district of Inachus; Pyræchma the Ætolian and Degmenus the Epean for Elis; Corbis and Orsua for Ibas.

(2) Sometimes conflicts are waged by an agreed and fixed number of men to decide the causes of the war, with the consent of the princes

and combatants. Thus in the war between the Ætolians and the Eleans two champions met on either side; in the war between the Romans and the Albans, the three Horatii met the three Curiatii, thus, says Florus, abbreviating the war; and in that between the Spartans and the Argives, three hundred fought on either side, with great peril to both parties.

(3) Most often quarrels are decided between larger forces in preliminary skirmishes followed by pitched battles. Thus, when Alexander entered Persia for the first time, and Darius sent part of his army with instructions to chastise and bring to him Philip's mad boy, Alexander attacked them in a position on the steep bank of the Granicus at great risk to his own men, defeated, and overwhelmed them by the valor of the Macedonians. After this he met and fought a pitched battle with the whole army of Darius, both being drawn up in battle array, and a hundred thousand Persian foot-soldiers and ten thousand Persian horsemen were slain; on the side of Alexander, five hundred and four were wounded, and thirty-two foot-soldiers and fifty horsemen only were killed. Then after he had again crossed the Granicus, and Mazæus, the chief general of Darius, had sent forward a thousand horsemen against him, Alexander ordered Ariston, the captain of the Pæonian cavalry, to charge them at full gallop; who, in the course of a notable engagement with the enemy, transfixed Satrapoces, the captain of the Persian cavalry, in the throat with his spear, and pursuing him as he fled through the midst of the enemy, unhorsed him and, as he struggled, cut off his head with his sword, and bringing it back laid it at the feet of the king amidst great applause. Thence Alexander set out with his army against the forces of Darius and fought a battle with them at Arbela, where Darius was put to flight, forty thousand Persians were slain, and less than three hundred Macedonians were missed.

In these *armed congresses* or battles, the more eminent in valor have regard to dignity and honor. Thus, before the battle of Arbela, Parmenio advised that there was need rather of stealth than of battle, that the enemy might be surprised on a stormy night, and, differing as they did in their customs and languages, and terrified by sleep and unexpected danger, how long would it be, he asked, before they could take the field in the midst of a nocturnal panic? Whereas in the daytime there would meet them for the first time the terrible visages of Scythians and Bactrians, their shaggy countenances and unkempt locks, aye and the marvelous size of their huge bodies, and the soldiers would be filled with vain and idle rather than just causes of terror. When practically all agreed with Parmenio, Polyspermon even thinking it certain that victory lay in the adoption of this plan, Alexander said:

“ This scheme of yours is the cunning of robbers and thieves, whose sole prayer is to escape discovery; but I will not suffer either the absence of Darius, or the narrowness of the position, or the theft of night, to

take away my glory; I had rather regret my fortune than be ashamed of a victory. Therefore get ye ready for battle."

Regard to honor was shown in the following incident. When the consul Camillus was besieging the Falisci, the master of the games led forth many of the noblest of the Faliscan boys, on pretence of taking a walk, and brought them to the Romans' camp; had they been cut off, it was certain that the Falisci would have laid aside their ardor for the war, and handed themselves over to Roman rule; but the Senate decreed that the master should be bound and the boys sent back to their own country, beating him as they went—an act of justice, which, says Valerius, captured the hearts of those whose walls it was impossible to storm; for the Falisci, conquered by kindness rather than by arms, opened their gates to the Romans. Camillus, says Florus, who was a man full of piety and of wisdom, knew that a true victory could only be won if faith was kept and honor untarnished.

So, too, when Timochares the Ambraciot offered to the consul Fabricius to murder Pyrrhus by poison by the aid of his son who prepared the king's potions, Fabricius reported the matter to the Senate and induced them to send ambassadors to warn Pyrrhus that he should guard himself more carefully against plots of this kind, mindful that the City had been founded by the son of Mars, and that wars ought to be waged by arms and not by poisons.

Seneca too says of him, "Fabricius refused the gold of King Pyrrhus; and, when Pyrrhus' physician offered to poison him, he warned the king to beware of the plot, and was equally resolved not to be conquered by gold, and not to conquer by poison. Hence," says he, "we admired a man who was great indeed, and, most difficult of all, a man innocent in war, and one who would believe a thing to be wrong, even against an enemy."

Following this example, when the prince of the Catti offered to procure the death of Arminius, the most cruel and treacherous enemy of the Romans, if poison were sent him for the murder, the Emperor Tiberius and the Senate replied that they took their vengeance on their enemies, not by secret treachery, but by open arms.

Nevertheless everything in war need not be done by force alone; there are some things in which an honorable guile and cunning may be used. Thus Polybius says that in war acts of force are sometimes less important than what is done from opportunity or deceit.

And Valerius Maximus says: "There is a certain form of cunning which is honorable and free from all blame, the acts of which are called 'strategems'; and these are allowable both in contests between a few champions and in battles between armies."

As to contests between champions, a notable example is mentioned by Florus: When the Romans and Albans, being equal in strength, were

wearing each other down by frequent battles, the fate of both peoples was intrusted to the Horatii and the Curiatii, three brothers on either side. The fight was even and glorious, and in its issue wonderful. For the three Albans being wounded, and two Romans killed, the surviving Horatius, using deceit to aid his bravery, in order to divide the enemy, feigned flight, and attacked and defeated each separately, as opportunity offered.

As to battles between armies, in which as much cunning as force was used, Valerius also gives the following examples; first Hannibal with the Romans, and then the Romans with Hasdrubal and Hannibal. Hannibal, he says, before descending to fight the battle of Cannæ, involved the Roman army in many cunning snares; for he was careful above all things that they should have the sun and the dust (which in that place is raised by the wind in great quantities) in their faces; secondly, he ordered part of his troops, in the very midst of the battle, to make a feint of flight, and when a Roman legion pursued them after they broke from the army, he caused it to be cut to pieces by men whom he had placed in ambush; finally he detached four hundred horsemen, who, feigning desertion, sought the consul, and were bidden, as usual with deserters, to lay down their arms and withdraw to the remotest part of the field; whereupon they drew the swords which they had hidden between their breastplates and tunics, and cut the hamstrings of the Romans as they fought. This, says he, was Carthaginian bravery, dressed out with tricks and ambushes and falsehood, which is now an excuse for our defrauded valor, for we were deceived rather than conquered.

Secondly, he relates how, when Hannibal was tearing one coast of Italy, and Hasdrubal had invaded the other, the junction of the forces of the two brothers, which would have crushed by an intolerable burden the weary fortunes of Rome, was prevented by the energetic counsel of Claudius Nero on the one side and the notable forethought of Livius Salinator on the other. For Nero, having shut up Hannibal in Lucania, deceived the enemy into thinking he still remained (for so the exigencies of war demanded) and set off with wonderful speed on the long march to the assistance of his colleague. Salinator, who was about to fight a battle on the next day near the river Metaurus in Umbria, received Nero into his camp by night with the utmost secrecy. He bade the tribunes receive the tribunes, the centurions the centurions, the horsemen the horsemen, and the footmen the footmen, and thus, without any confusion, introduced a second army on to ground which scarcely held one. Thus it came to pass that Hasdrubal was unaware that he was about to engage the two consuls, until he was routed by both. Thus, says he, Carthaginian cunning, notorious the whole world over, was baffled by Roman forethought; Hannibal fell a victim to the wiles of Nero, and Hasdrubal to those of Salinator.

2.

A *military embassy* is one which is employed to treat of things pertaining to war. Those who ordinarily went on such embassies were called among the Greeks *caduceators*, because they carried a *caduceus* or staff of Mercury, girt with the images of crested snakes; among the Romans they were called *fecials*, and their chief was the *pater-patratus*, one who had both father and children; they bore vervain as an emblem, a herb sacred to Jupiter and also used for the purification of houses. Among the moderns their place has been taken by *heralds*, formal messengers of kings, who are distinguished by an embroidered or parti-colored robe, variegated with the emblems of the princes by whom they are sent. Such messengers are employed to complain of injuries, to demand the restitution of property carried off, to threaten, to declare war, to obtain security for the coming and going of other ambassadors.

Extraordinary and more formal ambassadors are those appointed to treat of a truce, a peace, and their conditions. To such ambassadors the hospitable and kindly attentions paid to civil ambassadors are not shown; persons are sent to meet them on their arrival to forbid their nearer approach, nor are they admitted into city or camp. By ancient custom among the Romans a meeting of the Senate was usually held for the ambassadors of enemies at the temple of Bellona without the city. So Hezekiah excluded the ambassador of Sennacherib from Jerusalem; and the Goths, who were holding Urbino with a garrison, refused to admit the spokesmen of Belisarius into the city. Titus Quintius did not admit the ambassadors of the Bœotians, then enemies, into his camp. Constantius, too, excluded the ambassadors of Magnentius from his camp. Sometimes, however, ambassadors sent by a more powerful state are received with greater courtesy; thus Pyrrhus sent Lyco, a Molossian, to meet the Roman envoys who were making for his camp in order to ransom captives, that they might come thither more safely; and that they might be the more honorably received he himself, with a guard of cavalry, met them outside the gate, not being so elated by his successful fortunes as to neglect respect for men who at that time were his determined enemies in arms.

And those who are not afraid to show their own strength sometimes admit ambassadors into the camp; thus twenty ambassadors of the Scythians rode through the camp of Alexander, were admitted to his tent, and bidden to seat themselves; and Pirozes received Constantine, a Roman ambassador, in his camp, and Tullius Menophilus received ambassadors of the Carpi. The Roman consuls at Utica, when an embassy arrived from the Carthaginians, took their seats on an elevated tribunal, with generals, tribunes, and ranks of legionaries standing on either hand, glittering eagles and standards set up on all sides, that the ambassadors might see the vast number of their forces, and when the

trumpet had proclaimed silence, bade the ambassadors by the herald to approach. The ambassadors then passed through the lines of armed men, came to the place of the tribunal, and there were bidden to declare what they had come to seek. To these ambassadors, however, no less than to those sent in time of peace, security is due. So Cicero says: "An ambassador should be one who, not so much by his staff as by his title of spokesman, is able to pass unscathed amidst the arms of the enemy."

3.

Military or warlike conventions (of which the jurist Ulpian speaks) are when the leaders of a war agree together on certain terms. Leaders of a war are either *supreme*, as the Roman imperators, under whose *auspices* a war was waged; thus Livy says, "we recognize none as the leader of a war except him under whose 'auspices' the war is waged"; or *inferior*, as to which Cæsar says, "An imperator and a legatus have different functions; the one decides freely on the gravest matters, the other acts on instructions."

Leaders of the latter kind may make agreements on matters which concern the administration of the war, when the prince or supreme general is away. Such agreements or conventions relate to (1) safe-conduct, (2) armistice, (3) exchange and ransom of prisoners, (4) terms to be granted to those who surrender besieged places, and the like.

(1) *Safe-conduct* is a license granted during war to single or definite persons to go and return in safety; and security from the soldiers of the party granting it should be shown them not only within the territory, but also elsewhere.

(2) An *armistice* is defined by Paulus as an agreement, for a short and for the present time, that combatants will not attack one another; Varro calls it "the peace of a camp," or "the holiday of war." While it lasts, the combatants must refrain from all warlike acts and must allow each other to go and return without warlike equipment. Thus, when Rome was besieged by Tarquin, and an armistice had been made between Porsena and the Romans during the celebration of the games of the Circus in the City, it is said that the generals of the enemy entered, competed in the curule contest, and were crowned victors.

(3) Conventions are made about the exchange and ransom of prisoners. For although Alexander said, in kingly fashion, "I remember that I am no merchant, but a king; if it please us to return prisoners, it is more honorable to give them as a gift than to release them at a price"; and Pyrrhus promised to return his prisoners for nothing, if peace should be made, but otherwise not at all, for it was unfair to ask him to return prisoners whom the enemy might use against him; yet others have thought it honorable enough and more expedient to offer them for ransom. Thus Hannibal, when certain Roman soldiers had

come into his hands after the battle of Cannæ, fixed the price of ransom for each, for a horseman five hundred quadrigate sesterces, for a footman three hundred, for a slave a hundred; and ten of them he sent to Rome to obtain gold for ransom, having first bound them by oath to return to the enemy, if they failed to obtain it. And when one of these had pleaded their cause in the Senate, and a mournful shout was raised of those who begged the Fathers to restore their children, brothers, or kindred, some proposed that they should be ransomed at the public expense, others privately, others again by a loan from the treasury; but Titus Manlius Torquatus urged that since they had refused to make a sally against the enemy with Publius Sempronius Tuditanus and others who had followed him successfully, they no more deserved to be ransomed than those deserved to be surrendered to Hannibal, who by their great valor had restored themselves to their country. And indeed the Roman State, as Livy shows, from the earliest times showed little indulgence towards prisoners, and on this account Quintus Fabius Maximus, who had made an agreement with the enemy for the ransom of those prisoners who had done the better service, on this agreement being rejected by the Senate, sold his own estate for two hundred thousand sesterces and so redeemed his pledge.

(4) As dominions and territories, to prevent their being forcibly seized, are sometimes handed over to the control of others by an unconditional surrender, so fortresses, towns, and places defended by garrisons, are surrendered to the enemy on terms previously agreed, to avoid the evils attending a storm; and if they throw themselves on the honor of a general, before being threatened by extreme danger, they obtain better terms. Thus Cæsar announced to the Aduatici that he would preserve their city if they surrendered before the battering-ram struck the wall. In other cases the besieged stipulate that they may depart with their goods, or in safety, or with their arms, or be escorted to a certain place, which terms, if a surrender takes place, should be observed in every particular. And so when Marcus Fulvius was accused of having plundered Ambracia contrary to the terms of its surrender, and he contended that the city had not been surrendered but captured, because it was attacked with mound and penthouses, and because the fight had raged on the walls and under the ground for fifteen days, the Senate decreed that all its property should be restored to a city which had opened its gates to Fulvius, because terms had been agreed on.

4.

Military or warlike treaties are concluded by the authority of the persons who have the supreme power, either for a prolonged armistice, which is commonly called a truce, or for a perpetual peace. For though an armistice is often agreed upon for a short time, from necessity or some immediate occasion, yet sometimes it is granted for a longer time,

as when the Romans granted the people of Veii an armistice for a hundred years, then for forty, finally for twenty: an armistice of this kind is as good as a peace, and its violation involves greater danger. A treaty or compact of peace is an agreement for perpetual cessation from armed force, at least if the essence of a peace is that it should be perpetual, and it is so in the formula, "Let there be peace between the Roman and the Latin peoples so long as heaven and earth remain." Such a treaty, as we find in the threefold division of Menippus, is either when parties who are equal in war join in peace and friendship by an equal treaty: or is when terms are imposed on the vanquished, and in this the victor decides what the vanquished is to have and what he is to forfeit. The former, however, is a treaty in the strict sense, when two belligerents who have the power of deciding on war, make an agreement for the settlement of a war, and in which questions of remitting, or making reparation for offenses, of fixing boundaries, of commerce, and the like are dealt with; but such treaties are most enduring when, as Tullus warned the general of the Albans, attention is directed not so much to securing present friendship as to leaving no excuse for a renewal of war in the future. The other may be less strictly called a treaty or compact of peace, when after a victory the victors alone determine the conditions of the future peace; as when the Carthaginians, vanquished and broken after the first Punic war, were compelled to submit to conditions offered by the Romans, to wit, that they should evacuate Sicily and all the islands between Italy and Africa, pay 2,200 Eubæan talents for twenty years, restore the Roman prisoners without ransom, and that the allies of each people should enjoy security in the territory of the other.

5.

Treaties or compacts of this kind, as being contracted with higher authority, are sometimes confirmed by hostages who are given to secure the good faith of the state; and sometimes even fortresses and cities are handed over as a security. But when a peace is granted to the vanquished, greater precautions are taken; thus Livy records that it was an ancient custom of the Romans not to govern those to whom they were united by a treaty of unequal terms, as though the latter were completely subdued, until they had surrendered all their possessions, sacred and profane, hostages had been received, arms taken away, and garrisons quartered in the country.

1. *Paschal*, ch. 28; *Grotius*, II, 23, § 10; III, 20, § 43; *Gentilis*, III, 15; *Curtius*, I, 2, 3, and 4; *Florus*, I, 12; *Valerius Maximus*, VI; *Florus*, I, 3; *Valerius Maximus*, VII; *Frontinus*, on *Stratagems*. 2. *Braun*; *Ayala*, ch. 9; *Gentilis*, on *Embassies*, I, 6; *Paschal*, ch. 42. 3. *Gentilis*, III, 14; II, 10, 11; *Grotius*, III, 19, 30, and 21; *Polybius*, VI; *Grotius*, III, 20, § 49. 4. *Grotius*, III, 19 and 20; *Gentilis*, III, 1 and 13; *Besold*, on *Peace and the Law of Peace*. 5. *Ayrault*, *Judgments, on public agreements*, ch. 5; *Gentilis*, III, 19; *Grotius*, III, 20, § 52.

SECTION X.

Of Wrong between Belligerents.

There is a wrong between belligerents (1) when war is unjustly begun; (2) when the right of military congress or embassy is violated; (3) when military conventions and treaties are not observed; (4) when a victor exceeds moderation in following up his victory.

1.

War is begun unjustly when there is no cause for war; as when men rush into war, as Tacitus says, being greedy of danger for its own sake; or when the cause is unjust, as when war is undertaken from a desire for a change of territory, for instance, to leave swamps and wildernesses and possess a more fertile land, which, as Tacitus also says, was a cause of war among the ancient Germans; or when the cause is frivolous, as was that which Bodin refers to, when the Scots, because some dogs were stolen, commenced a most deadly war against the Picts with whom they had been on terms of peace and friendship for about six hundred years. Again war is begun unjustly when a declaration or proclamation of war is omitted: thus Aristides said that Philip, King of Macedonia, did not use heralds, so as to be able to crush his enemies unawares.

2.

The right of military congress is violated:

(1) When an ambush is prepared under the appearance of a conference; thus Attalus and the Roman envoys were led into danger when Prusias, King of Bithynia, brought his whole army to a conference instead of the thousand horsemen whom he had agreed to bring.

(2) When there is fraudulent and treacherous conduct; thus, when Albert, Count of Franconia, was besieged in the strongest fortress of the city of Bamberg by the Emperor Louis, whose son he was accused of having put to death, Otho, the Archbishop of Mainz, who volunteered to settle the dispute, swore to Albert that if he would go with him to the emperor he would either obtain peace or bring him back to his fortress; Albert, nothing doubting, followed him, and they had hardly left the fortress before Otho begged him to return to the fortress to dine, for fear that there might be something of a delay at the emperor's. They accordingly returned, and setting forth again after dinner came to Louis, where Albert was immediately seized and condemned to death. He

appealed to the Archbishop's word, to which the priest replied that he had kept his word, for he had brought him back safe once, and had not promised to bring him back twice. Not very different from this is what Dercilidas and Paches are said to have done: they promised the besieged a return to their city if they would come to them, and, when they came, threatened them with death if they did not surrender it, and finally allowed them to return to the city, when it had been surrendered.

(3) When the enemy are cheated by lies; thus when Lucius Martius and Attalus, who had been sent as ambassadors into Greece to King Philip, boasted on their return that they had deceived the king by an armistice and by the hope of a peace, and when a great part of the Senate approved, the old men, says Livy, remembering the ancient ways, disapproved of this new wisdom, and recalled that their ancestors had waged wars, not by trickery but by true valor. Again in an "armed congress" or battle it is considered an unworthy thing when, as Cicero says, what ought to be achieved by valor is attempted by a bribe, for instance, an attempt to corrupt subjects against their prince or country. And so blame has been laid on Philip, who openly practised that art and was accustomed to declare that he had found no stronghold so well fortified that it would not immediately open its gates at the approach of an ass laden with gold; wherefore he was called the purchaser rather than the conqueror of Greece.

It is an offense against the right of military embassy if violence or injury is offered to the ambassadors of the enemy: and therefore one who struck or injured an ambassador of the enemy was generally surrendered to the enemy. So in the consulship of Marcus Æmilius Lepidus and Caius Flaminius, Lucius Minutius and Lucius Manlius, having laid hands on the Carthaginian ambassadors, were surrendered to the Carthaginians by the fecials by the order of Marcus Claudius, the urban prætor, and conveyed to Carthage; and when Quintus Fabius and Cnæus Sempronius, the ædiles, struck ambassadors who had been sent from Apollonia to Rome, the Senate immediately surrendered them, by the fecials, to the ambassadors.

3.

Thirdly, there is an offense against military conventions:

(1) When persons are molested to whom a safe-conduct has been granted; it was in regard to this that Alexander's honor was impugned, when he ordered men whom he had allowed to depart, to be killed on their journey.

(2) When fraud is practised in the matter of an armistice, as by the Thracians, who, having agreed to an armistice of thirty days with the Thessalians, ravaged their territory by night, saying that they had agreed to an armistice of so many days, not nights.

(3) When fraud is used in the restoration of persons and things, as when the Platæans who had agreed to restore prisoners, put them to death first, and then restored them; and when the Romans, after binding themselves to restore to Antiochus the half of his ships, cut all the ships in two, and left him the half of each one.

(4) Another violation is when faith is not kept in a matter of ransom, as by the man who with ten others was sent to Rome by Hannibal, under oath to return to his camp if they failed to obtain the amount of their ransom; after starting he returned to the camp pretending to have forgotten something, and then followed his companions; and when the others, having failed in their object, returned to Hannibal, he went away home, on the plea that he had acquitted himself of his oath by his false return to the camp; but when the Senate learned of it they ordered him to be arrested and sent back to Hannibal in public custody.

(5) Lastly, when the terms of surrender are not observed; as when Saladin, who had agreed to liberal terms on the surrender of Ascalon, because he thought it was defended by a strong garrison, on finding that it was almost empty of soldiers, refused to adhere to those terms, on the plea that he had been deceived.

There is an offense against military treaties, when the terms of an armistice or a peace are broken. The people of Veii were destroyed root and branch with all their towns by the Romans because they had begun war against the Romans in breach of an armistice. And when the gallant general Hunyadi, after concluding peace with the king of the Turks, at the exhortation of the cardinal legate of the council, who was displeased with the agreement, renewed the war, this treachery roused the Turks to such fury, that they attacked the Christians on all sides with an enormous army and utterly routed them; and though the Emperor Sigismund had collected a countless host at Nicopolis, he was none the less crushed in a signal disaster, and the legate of the council was killed by robbers.

4.

Lastly a wrong is committed in war when victors, who can act at will, exceed moderation in following up their victory. For example:

(1) When they show no mercy to suppliants and to those who surrender—persons whom, as Giovio says, the laws both of humanity and of warfare are said to pardon; and Sallust in his Jugurthine history, having recorded that grown men were put to death after surrendering, remarks that this was a violation of the law of war.

(2) When women and children are put to death; as Thucydides says the Thracians did at the capture of Mycalessus, and Arrian the Macedonians at the capture of Thebes. Alexander, however, said, "I do not wage war with women"; and as to children, Camillus said, "We

do not bear arms against an age which is spared, even at the capture of cities."

(3) When burial is denied to the enemy's dead; a right which Appian calls the common right of war, and Philo the "commerce" of war. Thus Hannibal sought out the Romans Caius Flaminius, Publius Æmilius, and Tiberius Gracchus, to bury them, and the same respect was shown to Hanno by the Romans, to Mithridates by Pompey, and to King Archelaus by Antony: and Suidas says that it was a great disgrace to Lysander that he did not allow slain enemies to be interred. Isocrates too says that when the Thebans refused burial to their Argive foes, Theseus and the Athenians made war against them on that account.

(4) When sacred places and tombs are profaned: thus Philip, says Florus, exceeded a victor's rights by his destruction of temples, altars, and even tombs.

1. *Grotius*, II, I, 22, and 23; *Ayala*, I, 12; *Gentilis*, I, 7, etc.; II, I; *Curtius*.
2. *Paschal*, chs. 38, 39; *Volateranus*, *History of Franconia*; *Braun*, IV, 23; *Paschal*, chs. 25, 26; *Besold*, ch. 5.
3. *Gentilis*, II, 4; *Florus*, I, 12; *Bodin*, V, 6.
4. *Gentilis*, II, 16, 17, etc.; *Grotius*, III, 4, 5, 11, and 12.

PART II.

SECTION I.

Of Procedure between Nations and of Questions of Peace.

Procedure between nations is the means whereby disputes between themselves or their subjects are decided: (1) when they have fixed judges; (2) when they agree to refer to arbitrators; (3) when they submit to judgment by the law of the place; (4) when jurists pronounce censure on them.

1.

Besides the procedure of war, by whose doubtful and costly issue disputes between sovereign princes, and peoples are commonly settled, neighboring peoples, however free, sometimes have fixed judges to decide their quarrels. Thus among the Amphictyons (seven famous cities of Greece who drew into alliance with them nearly all the others) there were judges called Myrii, who, at conventions at which representatives of all the cities were usually present, decided the questions and disputes arising between the members; and so great was the authority of this tribunal that the gods themselves are said to have referred their feuds to the Amphictyons. And in Gaul Cæsar records that conventions of this kind were held, for, though the Ædui, Carnutes, Arverni, and Bellocassi had separate aristocratic governments, yet the differences of all were settled by the decrees and judgments of the Druids.

2.

Sometimes peoples between whom existed a dispute and contention agreed to refer it to the arbitration of others. Thus Adrastus and Amphiaraus submitted to the judgment of Eriphyle in the matter of the Argive kingdom; the people of Ardea and Aricia argued their case before the Roman people, the King of Numidia and the Carthaginians before the Roman Senate, the Parthians and Armenians before arbitrators appointed by Pompey.

3.

Thirdly the subjects of foreign princes and peoples sometimes accept trial before the ordinary judges of the place in which the dispute arises. Thus Antonius Gamma tells how the French and Castilians submitted to judgment in Portugal on a question of booty taken in a naval war. And the Spanish orations of Albericus Gentilis show that the Spaniards and Dutch and other foreign peoples often went to law on maritime questions in the Court of Admiralty of England.

4.

Fourthly, judgment is pronounced by doctors and jurists on the deeds of princes and peoples, which affects their reputation and credit. So, when Elizabeth, Queen of England, was considering whether to put Mary Queen of Scots to death after her condemnation, one reason among others, says Camden, against taking away her life was the fear of discredit among historians of the future. On causes and problems of this kind many volumes of disputations and decisions have been written, to justify and condemn the past and perhaps to direct the future. And to such judgments the following questions about peace and war have reference.

1. Bodin, I, 7, § 74. 2. Grotius, II, 23, § 8. 3. Gamma, *Decisions*, 384. 4. Camden, *Annals*, 1587.

1. *Whether we may have peace with all men?*

Nature, says the jurist Pomponius, has established a kind of kinship between all men. Now by the rights of kinship men are bound to help and benefit one another, much more (as peace requires) to abstain from injuring one another; and the human race naturally seeks after the blessing of peace, says Augustine, because in this mortal life there can be nothing more pleasant and useful. Aristotle, however, says that certain men, that is, barbarians, are made to be slaves, and that war against them is the same as hunting wild beasts. And Philip, King of Macedon, says in Livy that the Greeks wage eternal war with all foreigners and barbarians; for they are enemies by nature, which is unchanging, and not for reasons which change from day to day. Nevertheless man is not naturally repugnant to man; it is custom that leads them to agreement or disagreement.

Gentilis, I, 12; Grotius, II, 20, § 40.

2. *Whether peace or war is at times the more disadvantageous?*

Hannibal, after his return from Italy to Africa, said: "No great state can remain at peace; if it has no enemies abroad, it finds them at home." And after the end of the third Punic War, when Cato had declared that Carthage must be destroyed, Scipio Nasica, says Florus,

urged that it should be preserved, lest when fear of the rival city was removed, the prosperity of Rome should lead to degeneracy. And so Cyrus, after his conquest of the Lydians, took away their arms and horses and ordered them to follow the trade of shopkeepers and other base trades; so that a race, once powerful through industry and strength of hand, became effeminate through self-indulgence and luxury, and lost its former qualities; and men whom, before Cyrus' day, war had shown to be invincible, sank into luxury and were overcome by idleness and sloth.

Livy, book XXX; Florus, II, 15; Justin, book I.

3. *Whether an unrighteous peace is to be preferred to a righteous war?*

Marcus Lepidus, while commander in Transalpine Gaul, sent messengers to the Senate and recommended that peace should be made with Antony, to avoid the mischiefs of civil war. Some of the senators supported this view, but Cicero dissented saying:

"The name of peace is sweet; and peace is a pleasant and a healthful thing; for that man can not hold dear his own hearth, nor the laws of his state, nor the rights of liberty, who delights in feuds, or the slaughter of citizens, or public war; and there is nothing more loathsome than the citizen or man—if citizen or man he can be called—who longs for civil war. But our first consideration must be whether war may not be justifiable when the price of peace is slavery."

And again in a letter to Atticus he calls this the most difficult of political problems, namely:

"When our country is oppressed by unlawful tyranny, whether at all costs we must do our utmost to remove it, even though thereby we bring the state into the greatest danger?"

Elsewhere, however, he says in a calmer spirit:

"To my mind Peace with one's countrymen on any terms seems more expedient than civil war."

Cicero, Philippic, XIII; Letters to Atticus, IX, 4; Grotius, I, 4, § 19; Ayala, I, 12, § 4.

4. *Whether we should cling to peace when our neighbors are at war?*

When the Romans first sought the friendship of the Achæans, and Cleomedon, Philip's emissary, urged a middle course, to remain quiet and abstain from arms, Aristæus the Achæan leader maintained that this was no middle course, but no course at all. For, he said, besides that we must either accept or refuse alliance with Rome, what other fate can befall us (having the firm favor of neither side, for we shall have waited for the result in order to trim our plans to fortune) but to be the prey of the victor? So, too, when Pompey and Cæsar were at feud, Porcius Cato, though in the interests of the state he disagreed on many points with the leaders of the rival parties, and thor-

oughly approved of the aims of neither, attached himself to the party which seemed to have the balance of justice on its side. This is the right course for those who are unequal in strength to the combatants; those who are equal in strength or more powerful may wisely and honorably take no part in wars between their neighbors, so that they may be called in to settle their differences.

Livy, book XXXII; Ayala, I, 12, §§ 17, 18; Bodin, V, last chapter, § 588.

SECTION II.

Of Questions of Status between those at Peace.

Questions of status between those at peace arise when an inquiry is made as to the condition of a prince, or people, or their subjects. Whether status remains the same, is changed, or lost? and the like.

1. Whether the German emperor may also be called Roman?

John Bodin says that the Germans usurped the title of the Roman Empire for the sake of the glory of it, and the jurist Costalius says that he does not know whether and where the Roman Empire exists; and Sleidanus, a German by race, in his speech to Charles the Fifth, even says that the Roman Empire is fallen and scattered, like the three empires that went before it. For once its rule extended far and wide to the eastern and western sun; now all that it held in Asia and Africa is lost; once it possessed the greatest and most fertile parts of Europe, but now out of that great mass, as it were, many other kingdoms have grown, entirely separated from the body itself, and there is absolutely nothing left of it save the title and name, which Germany still retains; for upon her last of all was bestowed the power of creating the Cæsar, who, however, is so entirely unworthy of comparison with the ancient Roman emperors that he does not even occupy the ancestral seat and ancient residence of the Cæsars, the City of Rome.

Others say that the Roman Empire devolved on the German because the right of choosing the Roman Emperor always lay with the people of Rome; when an emperor was chosen by the legions, the people of Rome ratified his election; when he lived at Constantinople, the Quirites of Byzantium, who were Roman citizens, gave their consent; finally, when a woman, Irene, after blinding her son, had seized the Eastern Empire, the Roman citizens would not tolerate it, and by their acclamations chose Charles the Great, to give peace to Italy by his arms, to be Emperor, and caused him to be crowned by Leo the Third, the Roman Pontiff. By this title all the possessions of the Roman Emperor which had not been abandoned or seized by others or which had not passed by treaty or right of war into the dominion of others, passed to him and his successors.

With this agrees what is told in the vision of Daniel, that the Roman Empire, which was partly of iron and partly of clay, would endure till the end of the world. Nor does it seem to be any objection that they do not retain the vastness and splendor of the old Roman

Empire; for Jerome interpreted the fact that the foot of the image ended with toes partly of iron and partly of clay, to mean that the Roman Empire, which was formerly strong and powerful, would afterwards become infirm and weak; and though the greater part of it has been seized by others, yet it is not wholly destroyed. Still less can it be thought to have disappeared because the seat of Empire has been removed; because as a state is not bounded by walls, so an empire is not limited to a fixed place. Rome once existed at Veii under the guidance of Camillus, and the Roman Emperor continued to exist after he fixed his seat at Constantinople.

Grotius, II, 9, § 1; Arumæus, Discourse on Politics, I, 2; Limnaeus, on Public Law, I, 4.

2. Whether the imperial dignity is derived from coronation by the Pope?

On the death of the Emperor Henry, some of the electors chose his brother Philip to be emperor, while others chose Otto. A question having accordingly arisen, a legate was sent by the Pope who confirmed the election of Otto; and when the princes on Philip's side questioned his right to this power, Pope Innocent the Third replied that he recognized the right of the princes to choose a king for promotion to be emperor, for that right came to them from the Apostolic See; but the princes on their side ought to recognize that the right of examining the person to be promoted to the throne regarded himself, who anointed, consecrated, and crowned him. Pope Adrian, indeed, in a letter to Frederick, writes much more haughtily, saying:

"The Roman Empire was transferred from the Greeks to the Alemanni, on the understanding that the King of the Teutons should not be called emperor before his coronation by the Pope; whence then does he derive his title save from us? He receives the name of king by the election of his own princes, but he receives the name of emperor, Augustus, and Cæsar by our consecration. Therefore his empire is derived from us, and, as Zacharias transferred the empire from the Greeks to the Teutons, so we may transfer it from the Alemanni to the Greeks."

So Alciati, too, says that from the time of Charles the Great the right to choose the Roman emperor has lain with the Roman See. The Germans, however, maintain that an emperor elected and proclaimed by the electors is truly emperor, even though he has not yet received coronation by the Pope; and that Charles the Great received the empire from the votes of the people, not from the Pope, whose duty it was to crown him. They urge that crowns are as a rule placed on other kings by the archbishops or bishops of their own kingdoms, yet that the kings do not for this reason owe their kingdoms to them. And they point to many emperors who never were crowned by the Pope, as for example Maximilian the First, Ferdinand, Maximilian the Second, Rudolph, and

Matthias, who never asked it. Nay, at the celebration of the coronation of the Emperor Charles the Fifth by the Pope at Bologna, when a great bridge, on which the Emperor was walking, collapsed, some persons, according to Cornelius Agrippa, turned the incident into an omen and prophesied that in future no emperor would be crowned in Italy.

Alciati, Formula of the Roman Empire; Arumæus, Discourse on Politics, 3; Besold, on Precedence, ch. 2, § 4.

3. *Whether the emperor has sovereignty over other kings and princes?*

That other kings and peoples ought to be subject to the emperor is held by many jurists, Italian and Ultramontane, as well by those who profess the canon law as by those who profess the civil law. The canonists argue that God made two great lights in the firmament of heaven; that is, that He established two chief dignities, the Pope and the Emperor; that Christ said with the same meaning, "Behold, two swords"; that there went out a decree from Augustus that all the world should be enrolled. The Legists say that the Emperor Antoninus, in a rescript to Eudæmon of Nicomedia, said "I am lord of the world"; that in some places in the Civil Law all things are said to belong to the prince, that is, to the emperor. And so Bartolus boldly declares that he is a heretic who says that the emperor is not lord and monarch of the whole world. The Citramontane doctors hold the contrary view; the emperor never was lord of the whole world, because in the days of the chief monarchies there were also kings who were never subject to him; that the Roman emperors sometimes address their constitutions not "to all peoples," but to all peoples subject to their rule; that in the practice of commerce they distinguish those who obey the rule of Rome from those who are subjects of the King of the Persians; that they also recognize other free peoples, with whom they have rights of war, capture, and postliminium; that although God has created two kinds of powers, ecclesiastical and temporal, yet He has not set over them *two* supreme heads alone. They argue that when Augustus ordered all the world to be enrolled, and when Antoninus called himself lord of the world, it must be understood of the Roman world and of that part of the world over which the Romans ruled. Ulpian too reads the constitution of Antoninus as meaning that those who were in the Roman world were made citizens of Rome. The Jews too said that Jerusalem was situated in the middle of the world, that is to say in the middle of Judæa, or the world inhabited by the Jews. Finally they argue that Bartolus, in declaring that any who held a different view was a heretic, was no less mistaken on the point than were those who decreed that any who affirmed the existence of the Antipodes should be regarded as a heretic.

Chassanaeus, Catalogue of the Glory of the World, part V, 28; Covarruvias, II, § 9, Peccatum; Francis de Victoria, Theological Relections, V, §§ 2, 3; Grotius, II, 22, § 13; Limnaeus, on Public Law, II, 8; Arnisaëus, on the Law of Treason, I, 2, where the question is fully discussed.

4. *Whether a prince or people changes status by dependency or by an unequal treaty?*

Clients or dependents are under protection, not under dominion, as Sulla says in Appian, and Proculus says:

"As we recognize that our clients are free, though they are not equal to us in authority or dignity or rights generally, so it must be recognized that those who are bound to respect our majesty with a good grace are also free. Nor is it any objection to this that sometimes the word 'command' is applied to the superior, and the word 'obey' to the inferior, as happens in matters in which both are interested."

So Thucydides says:

"It becomes those who are the chief parties in a treaty to claim no special advantages for their own interests, but to have more influence than the other parties in settling matters which affect all."

It often happens, however, that under the form of protection and treaty inferiors are subjected to the sovereignty of superiors. Thus Polybius observes that the Thessalians were nominally free, but were really under the sovereignty of the Macedonians; and the Latins used to complain that under the shadow of a treaty with Rome they endured slavery. This happens if no protest is made when troops are brought in for a garrison, and when an unequal treaty is made perpetual.

Grotius, I, 3, § 21; Bodin, I, 7, § 68; Arnisaeus, on the Law of Treason, I, 4.

5. *Whether it detracts from the majesty of a prince or people to admit laws from other sources?*

At the beginning of the Roman Republic, when the kings had been expelled and the people were living under uncertain law, it was resolved to send men to Greece to bring from there the laws which were written on the Twelve Tables. And afterwards, when the empire was at its zenith under Tiberius Claudius, to regulate the business of sailors and merchants engaged in maritime trade, the Rhodian laws were obtained from the island of Rhodes, which laws were inserted in the Corpus of Roman Civil Law. Others, however, have entirely declined to adopt foreign laws, urging that those who adopt the laws of others seem also to recognize their sovereignty. Thus the Senate of Paris by an ancient decree and Philip the Fair by an edict declared that no one should set up the laws of the Romans against the customs and laws of his own ancestors; and the kings of Spain forbade, under penalty of death, the citing of the laws of the Romans as law in their dominions. But indeed, though it is a sign of subjection if the laws of another country are imposed on a prince or people against their will, it is not so if they adopt them freely and voluntarily. It is an intolerable indignity to set up foreign laws against the institutions and customs of one's own country, and accord-

ingly the Emperor Antoninus only adopted the Rhodian laws in so far as they did not conflict with any of his own.

But when the law of the land fails, it is right to have recourse to the laws of others, as the authors who have handed down the feudal customs admit, when they lay down that although the validity of Roman laws does not extend so far as to override use or custom, yet whenever a case arises which is not provided for by the custom of the fief, the jurist may without reproach use the written law, that is to say, the civil law. So although Luther publicly burned the books of Pontifical Law, yet in those dominions of Germany which accept the Augsburg Confession, ecclesiastical causes which do not concern religion are even now decided according to Canon Law. And in England, after the authority of the Roman Pontiff had been repudiated, Canon Law, in so far as it is not repugnant to the statutes of the royal prerogative and the customs of the realm, is accepted; and for the same reasons military causes and maritime causes for which the common law of the realm does not provide are tried in the courts of the constable and the admiral respectively according to the Roman Civil Law.

Digest, I, 2, 2, 4; Jacobus Gothofredus on the authority of the Lex Rhodia, Digest, XIV, 2, 9; Bodin, I, 8, § 101; Choppin, on the Domain of France, II, § 5; Valentine Forster, on the retention of the Canon Law in Reformed Universities; Statute of Henry VIII; Selden, Dissertation on Fleta.

6. *Whether a prince has sovereignty over another prince
in his own territory?*

When Mary Queen of Scots was accused of treason and condemned to death by the judgment of the delegates in England, there were, as Camden says, good judges who said that she had been too harshly dealt with, because she was a free and sovereign princess over whom God alone had authority; that she could not be guilty of treason, not being a subject; and that an equal has no power over an equal; for which reason the judgment of the Emperor against Robert of Sicily was pronounced void, because Robert was not a subject of the empire. Others took a different view, urging that she was subject, not indeed by origin, but a temporary subject; for there can not be in one kingdom two princes absolute in point of authority; and an equal has power over an equal whenever the one submits to the judgment of the other, either expressly by words or impliedly by making a contract, or committing a wrong, within the jurisdiction of the other; and they assert that the Pope annulled the Emperor's decision against Robert of Sicily because the act was not committed in the Imperial territory, but in the Papal. Lastly, they point out that there is no great example which does not contain an element of injustice.

Camden, Elizabeth, 1586, on the Reasons of the ambassador of the King of France, and the replies given to the same; Gentilis, III, 8, on the judgment of Charles, King of Naples, against Conradine.

7. *Whether a people is to be regarded as the same, when its government has been changed?*

Aristotle denies that a state is the same after a change in its form of government, just as, he says, a melody is not the same when it passes from the Dorian to the Phrygian mode. But whether in such a case the debts of a state ought to be paid, is another question which statesmen and jurists may decide differently. And just as a regiment may be regarded in two aspects, as governed by its officers and as serving in war, so a state may be regarded in one aspect as a relation between the parts which govern and are governed, and in another as a legal association; and on this latter view the Roman people was the same people under kings, consuls, and emperors.

Grotius, II, 9, § 3.

8. *Whether a people is changed by a change of place?*

If a people migrates, whether voluntarily, on account of famine, or compulsorily, it does not cease to be the same people; but if there is a departure to form colonies, a new people comes into being, for, says Thucydides, they are not dismissed to be slaves, but to enjoy equal rights.

Grotius, II, 9, §§ 7 and 3.

9. *Whether a prince may ennoble his own subject in the territory of another prince?*

When the Emperor Sigismund wished to create the Count of Saxony a Duke at Lyons, the Governor of Lyons opposed him so strenuously that the Emperor was unable to exercise his power freely before he had left the territory of the Kingdom of France. And when the Emperor Charles the Fifth, after being received in France with most generous hospitality by King Francis, had created a number of barons and knights on the petition of the said king, a question afterwards arose, and it was decided that the creations were invalid. The reason given is that a prince outside his own territory is no more than a subject and can not exercise the rights of a prince without infringing the dignity of the other prince. Yet despite these objections the contrary view is rightly upheld, that a prince as regards his own subjects does not cease to be a prince in the territory of a friendly prince; for matters belonging to his voluntary jurisdiction may be exercised outside his territory, especially if (as is said to have been the case with Charles the Fifth) the act is done with the consent of the prince of the territory.

Bodin, I, 9, § 202; Sleidanus, Commentaries, book XII; Josias Nolden, on Nobility, ch. 2, 184; Digest, I, 16, 2.

10. *Whether a subject on whom a title has been conferred by a foreign prince ought to enjoy the same in his own country?*

For his brilliant services in the Hungarian war against the Turks at Gran, the Emperor, by letters of honor, created Thomas Arundell of Wardour a count of the Holy Empire, and all his posterity and descendants counts and countesses. When, on his return, he began to exalt himself among the people in virtue of this title of honor, the question arose whether such a title conferred by a foreign prince, without the queen's consent, ought to be recognized. Some thought that rewards of valor ought to be recognized, by whatever prince they were conferred; for valor decays unless those who have done good service are encouraged by rewards. They pointed out that Henry the Third, King of England, recognized Reginald Mohun created Count of Somerset by the Roman Pontiff; and that Henry the Eighth, when Robert Curzon had been created Baron of the Holy Empire by the Emperor Maximilian the First, in recognition of his military valor, was so pleased that he enrolled him among the barons of England. The barons of England, however, foreseeing that this practice would diminish the privileges and the dignity of themselves and their order, argued against it thus: Such titles of distinction ought neither to be accepted by subjects nor recognized by the prince; to the prince alone it appertained to distribute dignities among his subjects, following the decree of the Emperor Valerian, that "That alone shall be a title of honor which is borne by our command"; the majesty of the prince and the obedience of his subjects were much impaired if they should be permitted to accept honors from foreign princes. In the Republics of Venice and Genoa any who accepted ecclesiastical dignities from the Pope, or civil dignities from a foreign prince were not called to office in the State, as men whose loyalty was suspect; that Mohun had not been recognized in England as a count was clear from the public records; and Henry the Eighth had treated Curzon as a baron of England in order to destroy without delay the shadowy title of Baron of the Holy Empire; he had not granted a vote in Parliament. The Queen when consulted on the subject declared that, as it does not become modest women to cast their eyes on any man save their husbands, so subjects ought not to look on any prince save him whom God has given them. "I would not have my sheep branded with another's mark, I would not have them follow the call of a strange shepherd." For the same reason, two years previously, the Queen compelled Nicolas Clifford and Antony Shirley, whom the King of France had enrolled in the order of St. Michael, to make their resignation, to send back their insignia, and to see that their names were removed from the rolls of the order. When the King of France heard of it he is reported to have said: "If the Queen wishes to do a like favor to myself, she can, if she

choose, elect any scheming Frenchmen whom she next sees in England, to the order of Arthur's Round Table."

Camden, Annals, 1596 and 1594.

11. Whether, when the same prince is head of two kingdoms, one born in one kingdom has the rights of a subject in the other?

By the English common law a stranger, or one born out of the kingdom, can not inherit lands or estates within the kingdom. When James, King of Scotland, succeeded Elizabeth on the throne of England, Robert Calvin, born in the kingdom of Scotland, brought an action against John Bingley, claiming certain lands in the city of London by right of inheritance. To this Bingley, on the other side, objected that Calvin was an alien, having been born in the kingdom of Scotland, within the allegiance of the King of Scotland, and without the allegiance of the King of England; and, therefore, that he could not be the heir of lands within the kingdom of England nor bring an action for the same. For Bingley it was argued that although the two kingdoms of England and Scotland were subject to King James, yet the two kingdoms had been and still were distinct and separate: that each kingdom had its own crown, its own laws, its own separate seal; and it was regarded as an established principle that when two rights meet in one person, the result is the same as if they resided in different persons. For Calvin it was contended that it was clear from the English judicial records that when the same persons were Kings of England and Dukes of Normandy and Aquitaine, which also had different laws and customs, subjects of the duchies were capable of inheritance in England; and that even then the same right was admittedly competent to subjects born in Ireland and the islands of Guernsey and Jersey. And so the Lord Chancellor and twelve judges, that is the entire court with two exceptions, gave judgment in favor of Calvin. Of these two the Chancellor said that just as the doubts of the Apostle Thomas gave occasion for more firmly believing in the resurrection of Christ, so the hesitation of the two (whose names were Thomas) gave their brethren the stronger grounds for confirming their opinion.

Speech of Lord Chancellor Egerton in the Exchequer Chamber, Coke, Reports, book VII.

12. Whether a citizen or a subject may leave his country or state without obtaining permission?

We know, says Grotius, that there are peoples, the Moschi for example, where this is not allowed, and we admit that a society can be formed with this as one of its conditions, and that customs have the force of an agreement. But we ask what ought to be the rule by nature, in the absence of any special agreement on the point. And certainly it

is clear enough that the citizens can not depart in a body. For if that were allowed, civil society could no longer subsist. As for the departure of individuals, the case seems different. Every one has the free power, says the jurist Tryphonius, of determining his own state; and Cicero in the *Pro Balbo* approves of the principle that no one shall remain in a state against his will, and he says it is the foundation of liberty that every man should be free to decide whether he will retain or abandon his own rights. Yet here, too, the rule of natural justice must be observed that there is no such right, if the interests of the society so require. For, as Proculus rightly says, it is not the private interest of one member of the society that is to be observed, but the advantage of the society as a whole. Now it is to the interest of a civil society that a citizen should not leave if a large debt has been contracted, unless he is prepared to pay his share at once. So, too, if a war has been undertaken in reliance on the number of the citizens, especially if a siege is imminent, unless the citizen is ready to provide an equally efficient substitute to defend the state. Beyond these cases, it may be considered that peoples agree to the free departure of citizens.

Grotius, II, 5, § 24.

*13. Whether the same person may be a citizen of two states
at the same time?*

Cicero in his speech "*Pro Cornelio Balbo*" says:

"A wonderful and admirable, aye, an inspired principle has been established by our forefathers from the beginning of the Roman name—that no Roman can be a citizen of more than one state; for the dissimilarity of states necessarily involves variety in law."

But Cicero also says, in the second book of the *Laws*, that he and all citizens have two countries, one by nature, the other by law, as for example Cato who was born at Tusculum and was adopted into the society of the people of Rome. This was supported by the opinions of the jurists: thus Paulus says that the senators would in this way seem to have a domicile in the city, and yet they are also deemed to have a domicile in the place of their origin. And the Emperor Antoninus said to Silvanus: "Since you claim to be a Biblian by origin, but to reside at Berytus, you are rightly compelled to discharge public duties in both cities."

To this it is answered that although Cicero allows that citizens may have two countries, and in the *Laws* is ready to grant two domiciles in different states, yet this only holds good of cities subject to Rome, since one country or state contains the other; or again when the two cities are under the same prince, as Biblus and Berytus belonged to the same province, Phenicia. And the inference that a man with property in different places is therefore bound to discharge public duties in those places does

not hold good when a man removes to a foreign state which is subject to a foreign people or prince, or when it is a question of civil privileges. This distinction is accepted by Baldus the Perugian, who says that a Perugian, that is, a man born at Perugia, who lives at Siena or Florence, does not leave his place of origin, because Perugia, Siena, and Florence are in the same province; but when a man removes to another province he abandons his place of origin, changes his state, and is reckoned as belonging to the new province and state.

Jean Bacquet, Treatise on the Droit d'Aubain, chs. 39 and 41, in the suit between Cenamy and Longueval; Digest, I, 9, 11; Code, X, 38, 4; Baldus on Code, IV, 12; Grotius, II, 5, § 24.

14. *Whether one who has lived for a long time in a foreign kingdom and has married there is to be regarded as having renounced the country of his birth?*

On the death of Jean de Cenamy in France, Jean de Longueval entered upon the inheritance in right of Isabella d'Asnières, his wife, a kinswoman and legatee under the will of the deceased. Some years later proceedings about the inheritance were instituted against Longueval to establish the title of Pandolphe de Cenamy, the brother of Jean. Longueval objected to Pandolphe's title, that, although he had indeed been born in Paris, yet he had lived at Venice for more than thirty years, had established a domicile there, had married a wife and begotten children, and accordingly had lost all the rights of a subject of the Kingdom of France. He argued that a man becomes a citizen of the state into which he is received, because, as Tacitus says, where a stranger enters into a marriage alliance the land to which he comes is his country; and the prophet Ezekiel said, strangers who come to you and beget sons among you shall be to you as native-born.

For Pandolphe it was contended that, although he had lived long at Venice, he retained the rights of his place of origin, and therefore the rights of nature; because on the authority of Cicero no man loses his citizenship except of his own action; nay, as the Emperor Diocletian says, no man, even of his own wish, can divest himself of his citizenship of origin. It was urged that Pandolphe while living at Venice had never been given citizen-rights there, and that no man can become a citizen unless he is enrolled as a member of the state: just as men who lived at Rome did not become Roman citizens unless they received the right of the Roman toga. As to the custom of France, an alien, however long he lived in the kingdom, could not enjoy the civil rights of the kingdom unless they had been extended to him by the favor and grant of the prince. To this Longueval replied that also according to the opinion of Cicero a man could divest himself of citizenship, not only by committing crime, but also by abandoning his own state and enrolling himself as a member of another, and he pointed to the fact that, as Tranquillus

records, a Roman citizen was held before Nero to be an alien because he had abandoned his citizenship of his own choice and without committing any crime. He argued that a tree of ours, which has pushed its roots into another's land, changes ownership, ceases to be ours, and inheres in the soil of the other. That at Rome it was necessary to obtain the toga, and in the kingdom of France letters of naturalization, as they were called, were requirements introduced on account of the importance of the countries or for some special reason; other nations were not in the habit of enrolling citizens by name or of making a formal gift of citizen-rights. These and other arguments for himself and for his opponent are recorded by Longueval, who was an advocate at Paris.

The president of the Parisian Court, however, gave judgment for Cenamy, and the Court of Parliament, to which Longueval appealed, upheld the decision. Bacquet says that the judges were influenced by special reasons, and that their opinions in this case must not be regarded as stating the general law. Perhaps, however, they had regard to the principle that though residence and domicile in a foreign kingdom are sufficient to make a man subject to the jurisdiction and liable to the discharge of public burdens, yet they are not sufficient to make him a citizen in the sense that he shares in those civil privileges which belong to those born in the kingdom, without the supervision of a special enrolment. This was the rule not merely at Rome and in France, but also elsewhere. Thus Cicero says:

“By our law any man can change his state, provided that he is adopted by the state to which he wishes to belong: so that, if the Gadi-tanians, for example, were to pass a decree about some Roman citizen by name, he has power to change his state.”

And Plutarch records that Solon enrolled as citizens, exiles and others who had come to Athens of their own accord: and to be admitted to office is the same as enrolment. Cicero relates that this happened to certain Roman citizens, who, ignorant of the risk of losing their Roman citizenship, occupied seats among the Areopagites with a particular tribe and number. Pomponius Atticus, however, was wiser, for although he lived long in Athens, he refused for that reason to accept the honors offered to him.

Bacquet, Droit d'Aubain, ch. 41; Eguinarius Baro, commentary after the last law of Digest I, 5.

15. Whether one born in a foreign kingdom is entitled to the rights of a subject in the country of his paternal origin?

Mary Mabel, born of French parents in England, sued John de Valle, the son and heir, for a share of the goods of her grandmother Adenetta de Valle, who died at Paris. De Valle objected that she was born in England, a foreign kingdom, and that therefore, as she was an

alien, she had no right to succeed in France. For Mabel it was replied that even if she was born in England, still her place of origin was France, where her parents were born, and that she had a right to succeed in France, which though not her own country of origin, was that of her father, the more so as she had come to France with the intention of remaining and acquiring a domicile there, as was proved by letters from the king. The view that the place of her father's origin gave her a sufficient title was supported by many authorities on the civil law. Thus Ulpian says: "The son of two Campanian parents is a Campanian"; and "The son follows the state where the father was actually born, not the domicile of the father." And in support of the argument from Mabel's return to France, Ulpian says again, "A son born among enemies has the rights of a son if he returns to his father's country by postliminium."

It was replied on the part of de Valle that France was not subject to the Roman civil law; that by the custom of the land and the alien law, commonly called the "*Droit d'Aubain*," regard must be had to the place of origin or birth, not to family or descent; and that by this law sons born in France succeed to their alien parents who die in France, which would not be the law if the birthplace of the parents and not that of the children were taken into account. Sons born among enemies, it was submitted, enjoy the benefits of postliminium because their parents in captivity acquire no rights among the enemy: whereas Mabel's parents had acquired rights in England where they had lived for twenty years. Judgment was given for Mary Mabel on the first ground and on the second. On the point that she, born of French parents, had come to France with the intention of remaining there, the judgment followed the authority of the decision of Boerius of Bordeaux, by which it was laid down that a son, conceived and born in Spain of a French father and mother, who had gone to Spain with the intention of living there all their lives, having returned to France to his father's domicile of origin with the intention of remaining there, should be admitted by the custom of France to the right of "retraction," that is, to redeem possessions sold by his father; for the paternal origin, united with the domicile acquired by the son, was held to outweigh the son's own origin, especially in circumstances raising a presumption favorable to that view.

Bacquet, Droit d'Aubain, V, 39; Boerius, Decisions, 13; Matthaeus de Afflictis, Neapolitan Decisions, 384; Bertrand, Opinions, III, 157, § 16, and IV, 177.

16. *Whose subject is one who has been surrendered by his own people, and not received by another people?*

Mancinus was surrendered by the Romans for having made an unauthorized peace with the Numantines. Not being received by the Numantines, he returned to Rome and entered the senate, from which

Publius Rutilius, tribune of the people, ordered him to be led out, saying that a man whom the paterpatratus had surrendered was not a Roman citizen. Some have held that Mancinus, since he was not received by the enemy, remained a citizen; and this view is supported by Cicero, who says that a man can not be said to be surrendered who is not accepted; for there is not deemed to be either gift or surrender unless there is acceptance.

Others have agreed with the tribune of the people, that a man whom the State has rejected ceases to be a citizen, even though he is not accepted by the enemy, no less than a man under the interdiction of fire and water, or under sentence of deportation to an island. The jurist Modestinus seems to accept this view, giving his opinion that a man who is surrendered to the enemy and returns to his own country, unless received by his countrymen, is not a citizen; and this seems to be the better view, for Pomponius records that a law was passed making Mancinus a Roman citizen, which would have been superfluous if he had remained a citizen without it.

Ayala, I, 15, § 24; Digest, XLIX, 15, 4; Digest, L, 7.

17. Whether a refugee who has passed into the allegiance of another prince is bound by the laws of his own country?

John Story, an English refugee, having been enticed on board a ship, which was said to have conveyed heretical books to the Netherlands, was carried to England, where he was accused of treason for having revealed plans for invading England. He refused to submit to the laws, on the ground that he had abandoned England and placed himself under the allegiance of the King of Spain; but on the authority of the jurists he was condemned and punished as a traitor; since no man can divest himself of the country in which he was born, or the land of his birth, or renounce allegiance to his prince at pleasure. Perhaps it ought to have been decided otherwise if Story had been banished from England; for an exile who subjects himself to the power of another sovereign and is received by him is not bound by the authority of his former sovereign.

Camden, Annals, 1571; Bodin, I, 6, § 59; Grotius, II, 5, § 25.

SECTION III.

Of Questions of Ownership between those at Peace.

Questions of ownership between those at peace include questions of Occupation, Prescription, Probability of Right, Transfer, and Succession.

1. Whether possession of a thing can be acquired by the throwing of a javelin?

The Andrians and Chalcidians, having set out for Thrace to seek a new home, and receiving news that the barbarians had abandoned Acanthus, sent scouts, who, having ascertained that the barbarians had fled and the place was deserted, began a race to decide which people should by prior occupation acquire the city, which they regarded as abandoned. As the Chalcidian was the swifter, the Andrian hurled a spear and planted it in the gate of the city, and called out that he was first with his javelin; the Chalcidian, on the other hand, exclaiming that he was first with his person. A discussion having arisen from this incident, they called in the Parians, Samians, and Erythræans as arbitrators. The Andrians urged that it was not necessary to apprehend with the person the possession of a thing abandoned; it might be apprehended by the eyes, and intention alone; but here a weapon had been hurled as well, and therefore they were lawfully in possession; for if possession may be acquired by breaking a twig, throwing a pebble, or delivering a rod, why not by the hurling of a spear? The Chalcidians, on the other hand, contended that it was one thing to obtain possession by delivery from another by this or that method, another to occupy a thing without any delivery; for as long as a thing is not held by another, it may become the property of the occupant; as one who has wounded a wild animal is not considered its owner until he has caught it physically, for many things may happen to prevent him catching it; so, after the gate had been struck, it might have happened that he who had thrown the javelin would fail to get possession of the city. The decision was given in favor of the Andrians by the majority, for the Samians and Erythræans voted for them and only the Parians for the Chalcidians, as Plutarch relates.

Agrault, Judgments, V, 21, 1.

2. Whether the sea may be appropriated by occupation?

The jurist Ulpian says that the sea is open to all, and Celsus that the use of the sea is common to all. Paulus, however, maintains that if

a special right over the sea belongs to any man, an action by him lies where he is in possession. It is admitted, says Grotius, that the Law of Nations does not forbid the acquisition of sovereignty over the sea; and so Dio Cassius, he says, spoke of "all the sea which belongs to the Roman Empire"; and in the year's truce of the Peloponnesian War the Megarians were permitted to navigate the sea belonging to the territory of themselves and their allies; he even concedes more than this where the same prince holds the territories bordering a sea on either side, as happened in the case of the English Channel when the King of England was Duke of Aquitaine and lord of several places on the coast.

Morositus, however, maintains that even if the kings of England were dukes and lords of Gascony and Aquitaine, yet they acknowledged the king of France as their overlord in those parts; and hence, although the use and profit of the sea of Aquitaine and Normandy was with them, the jurisdiction and supreme lordship over it remained with the kings of France.

John du Tillet, however, in the second book "De Rebus Gallicis," frankly admits that the kings of France had no sovereignty over the sea, for their kingdom had been cut down by partitions and the kings confined to narrower dominions, because powerful vassals held the chief fiefs with full sovereign power, if you except their fealty; for the King of England, he says, held the duchies of Normandy and Aquitaine, Brittany had its own duke, and Flanders, Toulouse, and Provence their counts.

Grotius, II, 3, 13, and fully in the notes thereto; Morositus, Maritime World, II, 19; Grotius, The Free Sea; William Welwood, Reply to Grotius; John Selden, The Closed Sea.

3. *Whether princes or owners of a territory may appropriate things cast up on the shore?*

The Emperor Constantine Augustus thus decreed:

"Whosoever by shipwreck a ship shall be driven to shore, or shall put in to any land, it shall belong to the owners, and my treasury shall not intervene; for what right has the treasury in the calamity of another, that it should claim a profit from so grievous an event?"

But by later law, or rather by an evil custom, it has become the rule that those who possess territories bordering on the sea may plunder the goods of shipwrecked persons which are driven to shore, as well of subjects as of foreigners. So when the ambassador of the Emperor complained before Henry the Second, King of the French, that two ships cast ashore had been captured by Jourdan Ursin, and claimed to have them restored, the Constable, Anne de Montmorenci, replied that things cast ashore belonged by the Law of all Nations to the prince who ruled the shores.

René Choppin records that in Sicily, on the Italian shores, and in England, the profits of wrecks are accounted royal perquisites; and also that the same right belongs to the Duke of Brittany; for as the Breton princes foresaw the occurrence of frequent wrecks on that rocky and harborless coast, they issued an edict limiting the right of persons to put to sea at their own will, under which the dukes gave licenses to those about to make a voyage, after they had first consulted persons well acquainted with the sea and the coasts; and if any neglected to secure this leave, and a shipwreck occurred, what remained of the ships and the cargoes was confiscated to the state. This rule might not unreasonably be established by a prince so as to affect his subjects, but it could not confer any right to the goods of foreigners.

Code, XI, 5, 1; Bodin, I, last chapter, § 171; Choppin, on the Domain of France, I, last chapter, § 10.

4. *Whether a newly founded city belongs to the territory in which it is founded?*

The Jews and Syrians contended for the city of Cæsarea before Nero; the Jews maintained that it had been founded by Herod, that Herod had led a colony of Jews thither, and that it was therefore a Jewish city; the Syrians, on the other hand, urged that it had been founded in Syrian territory, and that Herod had advanced and enlarged it, rather than founded it. For whereas formerly it was known as Turris Stratonis, and inhabited by Syrians, Herod had called it Cæsarea, changing the old name, but not the old colonists, and it was incredible that he had built it with the intention of assigning it to the Jews, because in Cæsarea he had set up temples, and in the temples images, which are not allowed among the Jews. The Emperor was convinced by these arguments and held that it belonged to the Syrians.

Ayrault, Judgments, V, 21, 7.

5. *Whether ownership and right may be determined by conjecture?*

When the Athenians and Megarians were vigorously contending for the island of Salamis, the Spartans Critolaidas, Amompharetus, and Cleomenes, were called in as arbitrators, and, Solon pleading the Athenian cause and Hereas the Megarian, it was held that the island belonged to the Athenians. The ground of the decision was that the inhabitants of the island, in burying their dead, followed the rites of the Athenians and not those of the Megarians; for they had tombs placed towards the east, the bodies turned towards the rising sun, and the names of the families engraved, which customs they still employed. Not unlike this was the judgment in the case of the Isle of Mona or Man. This Island, as Giraldus Cambrensis records, being poised midway between the northern parts of Ireland and Britain, was the subject of a keen

dispute among the ancients as to which land it ought rightly to belong to. In the end the dispute was set at rest in the following manner: Ireland does not breed poisonous animals, but it was found that the island had admitted poisonous snakes which were brought by way of experiment, and accordingly public opinion declared that it should be awarded to the Britons.

Ayrault, Decrees, II, 46, 3; Camden, Britain, on the Isle of Man.

6. *Whether new possession may be awarded on the strength
of an ancient title?*

When the Athenians and Mityleneans were contending for the town of Sigeum, which was in the Trojan territory, they agreed at length to accept Periander as arbitrator. The Mityleneans claimed an ancient dominion, because it was certain that the Athenians under Pisistratus had forcibly seized the town from the Mityleneans; the Athenians, on the other hand, asserted that they themselves and the other Greeks who, under the leadership of Agamemnon, had lent their aid to Menelaus in the matter of the rape of Helen, had as good a right to Trojan territory as the Mityleneans. Accordingly Periander decided that each party should keep what they held.

Ayrault, Decrees, 58, 1, 2, and 3; de Thou, book LIX, Speech of the Duke of Nevers to the King of France, in the year 1574.

[7] *Whether in a question of ownership between others arbitrators
may pronounce in favor of their own right?*

The people of Aricia and Ardea accepted the Roman people as judge in a question of doubtful title to certain land. An assembly of the people was convened by the magistrates, and the question was hotly debated; and the witnesses having now been produced, at the moment when the tribes should have been summoned and the people given their votes, Publius Scaptius arose and, against the authority of the consuls, with the support of the tribunes, declared that he was in his eighty-third year and had served in the land in question, not as a young man, but when already a veteran of twenty years' service, during the war at Corioli; his memory was clear that the land in dispute had belonged to the people of Corioli, and on the capture of that place it became by right of war the public property of the Roman people; he marveled how the people of Ardea and Aricia, who never claimed the land while Corioli still stood, could hope to wrest it from the Roman people, whom they treated as judge instead of owner. The consuls, observing that Scaptius was heard not merely in silence, but with approval, calling on gods and men to witness that a great sin was being committed, sent for the leading senators, and with them implored the tribunes not to allow judges to

commit the worst of crimes, one which would be even worse as a precedent, by turning the dispute to their own advantage; especially as the gain derived from appropriating the land would be infinitely less than the loss incurred by alienating the hearts of allies by a wrong; for the injury to fame and honor was beyond all reckoning. These and the like arguments the consuls shouted aloud; but the spirit of cupidity, and its author Scaptius, prevailed; the tribes were summoned and gave judgment that the land belonged to the Roman people. Nor is it denied that it did so belong, had resort been had to the judgment of others.

As it is, says Livy, the dishonor of the judgment is in no wise atoned for by a good cause; and this judgment the Roman Senators considered as shameful and cruel as did the people of Aricia and Ardea.

More cruel and shameful still was the conduct of Philip, King of Macedonia, who, when two brothers, kings of Thrace, had chosen him to decide a dispute about boundaries, unknown to the brothers, came to the trial, as to a war, with an army in full array, and robbed them both of the kingdom for which they were contending; thus showing, says Curtius, that concord is the strongest of all supports for the preservation of empires and the establishing of kingdoms.

Livy, book III, at the end; Dionysius of Halicarnassus, book XI; Quintus Curtius, book I.

8. [7] *Whether "usucapio" or prescription runs between different princes?*

When Antiochus demanded certain cities from the Romans which his father and grandfather had never claimed, the Romans pleaded a possession of a hundred years, a period which covers three generations of men. Vasquez, however, denies that the right of "usucapio," which was introduced by the Civil Law, has a place in the relations between different kings or peoples. But if this is conceded, there will follow the great inconvenience that no lapse of time will extinguish controversies about kingdoms and their boundaries. And so the Laconians, in Isocrates, lay it down as absolutely certain, and admitted among all nations, that public possession, no less than private, is so confirmed by time that the possessors can not be ejected, a presumption of abandonment being raised by the lapse of a long time.

Grotius, II, 4, 12, etc.; Gentilis, I, 22.

9. [8] *Whether a right over the kingdoms of the West was transferred to the Roman Pontiff by the gift of Constantine?*

It is related that when the Emperor Constantine was suffering from the dread disease of leprosy, and the skill of the physicians was unable to cure him, the native priests advised him to bathe in a vessel filled with

the warm blood of infants; but when many had been brought for this purpose, and the priests were prepared to cut their throats, the Emperor shrank with horror from the ghastly deed. And in the same night the apostles Peter and Paul appeared to him and announced that they had been sent by Christ to warn him to receive the Christian religion and Holy Baptism at the hands of Sylvester, Bishop of Rome; having done which, he felt himself healed and purified, and on that account gave to Sylvester and his successors the City of Rome, Italy, and all the kingdoms of the West forever.

To strengthen the credibility of this story the following arguments are urged: The chapter dealing with this gift, inserted in the first part of the Decretals, and the authority of that chapter are not only approved by Innocent and the canonists, especially by Cardinal Alexandrinus, but are also quoted by the legists Bartolus, Baldus, Cynus, and others in many places. An uninjured example of the whole work published in Latin from the Greek Codex in the Vatican Library, by Bartholomew Picernus, and dedicated to Pope Julius the Second, is extant.

Others, who have investigated the question more expertly, observe that the ecclesiastical writers of that time, Eusebius, Jerome, and Basil, make no mention of this alleged record; that Platina, who collected all the instruments bearing on the status of the Church in temporal matters, records nothing of the kind. Pope Melchiades says that Constantine had embraced the Christian religion before the Pontificate of Sylvester; others say that he was baptized by the Bishop of Nicomedia in Jordan; his sons succeeded him in the Western as well as in the Eastern Empire, and they, and other emperors, held Rome, Ravenna, and other provinces of Italy, for three hundred years after Constantine (as is clear even from rescripts of the Popes); and this chapter in the Decretals, as Antonine, Archbishop of Florence, testifies, is not found in the older books of the Decretals and was not inserted by Gratian, but by another hand which marked this, along with many other passages, as of doubtful credibility, under the denotation "Palea." It is probable that the Italian canonists and legists, out of reverence for the Papal dignity, yielded to a mistake which their sympathies favored; and many have ascertained that the Greek original of Picernus is nowhere extant in the Vatican. Finally, Cardinal Nicholas of Cusa and Pope Pius denied the gift as a monstrous invention; and Laurentius Valla, a Roman and Papal noble, argued in an exhaustive and elegant oration, with many proofs, that Constantine neither made such a gift nor could have made it, nor could the Roman Pontiffs derive any right therefrom.

For the gift of Constantine, see the Canonists and Legists cited in Cathalanus; Bartholomew Picernus, on the privilege of Constantine. On the other side, Ulrich von Hutten, Letter to Leo X; Girolamo Cathalanus, Nicholas of Cusa, Laurentius Valla, on the Gift of Constantine.

10. [9] *Whether the Spaniards alone have a right to the territories of the Indies?*

When Francis Drake, in the year 1580, had returned to England after sailing round the world, Bernadine Mendoza, the Spanish ambassador in England, protested against the English sailing into the Indian Ocean. He received a reply from Queen Elizabeth that she failed to understand why her own and the subjects of other princes should be forbidden the Indies, which she could not be persuaded became Spanish property by the gift of the Roman Pontiff; she recognized in him no prerogative in such causes, much less authority binding on princes who owed him no obedience, to enfeoff, as it were, and invest the Spaniards with the possession of that New World, or with any right other than the right to sail to and fro, to build huts, to name a river or a promontory, which acts could not confer ownership; so that this gift of what belonged to another, which in law was null and void, and this imaginary ownership, ought not to prevent other princes from trading in those regions and founding colonies in places where the Spaniards had no settlement, without any violation of the Law of Nations, since prescription without possession is of no effect.

Camden, Elizabeth, 1581; Grotius, The Free Sea, ch. 13; Nolden, on Nobility, ch. 2, § 56, and following sections.

11. [10] *Which son of a king is to be preferred in the succession, one who was born before the accession, or one born after?*

When the empire was offered to Otto the First, his brother Henry, at the instigation of the Count Palatine, the Duke of Lotharingia, and other princes, claimed it by arms, on the ground that the throne appeared to be the right of himself, as having been born during his father's reign, rather than of Otto, who was born before his accession. On behalf of a son born after accession, it was maintained that when Artabazes and Xerxes, sons of Darius Hystaspis, were contending for the succession to the Persian kingdom, Demaratus the Spartan, who had been expelled from his kingdom and happened to be present at the time, declared that a son born after accession ought to be preferred to one born before, and that on these grounds the throne was awarded to Xerxes.

Guicciardini writes that the same rule was applied in the dispute between the brothers Ludovico and Galeazzo about the duchy of Milan, the latter of whom had been born before their father obtained the duchy, the former afterwards. On the other hand when this same dispute arose after the death of Darius between Arsicas, a son born to Darius in private life, and Cyrus, born after he became king, and Parysatis, the mother of Cyrus, urged the old argument of Xerxes in favor of her son, the Persians nevertheless awarded the kingdom to Arsicas; and again

Herod, King of the Jews, preferred Antipater, his son born before, to Alexander and Aristobulus his sons born after his accession; and the victory in the quarrel between Otto and Henry went to the same side. Hotman concludes that this side has the stronger case; and Grotius agrees with him, on the ground that it is proper that, as this is the law in all other inheritances and successions, it should also be observed in the inheritance of kingdoms.

Hotman, Famous Questions, 2; Grotius, II, 7, §§ 27, 28.

12. [11] *Whether in the succession to a kingdom a grandson by an elder son is to be preferred to a second son?*

When a dispute arose in Germany between uncles and grandsons as to the legitimate title to inheritances, the Emperor Otto the First called together the German Assembly to decide it; and when no agreement could be reached in the assembly between the princes and the representatives of the citizens, the question was intrusted to the arbitrament of battle, in which the side of the grandsons won the day. Precedents, however, are adduced on either side. For the second sons there is the story of Procopius, that on the death of Gaiseric, King of the Vandals, Gundamund, his grandson by Genso an elder son, was passed over, and the kingdom conferred on Honoricus, the second son. And Aimoin writes that when Clotaire, King of the Franks, died, Guntran, his second son, was preferred to Childebert, the son of the elder brother Sigebert. For the grandsons there is the incident, related by Plutarch, of Lycurgus, who, after he had reigned about eight months, and the widow of his elder brother Polydectes had given birth to a son, resigned the throne of Sparta to him; and Pausanias records that, on the death of Cleomenes, the Spartan Senate awarded the throne to Ares, a grandson, in preference to Cleonymus, an uncle.

It seems that, as a general rule, a grandson by a first-born son is to be preferred to the second-born in the succession, unless the law requires the eldest next of kin to take the place of the deceased, in which case a second-born son is to be preferred to a younger grandson by an elder son.

Hotman, Famous Questions, 7; John de Terra-Rubea; Grotius, II, 7, § 3; Hotman, Treatise on Royal Succession.

13. [12] *Whether a cousin ought to exclude a nephew by the deceased's sister from the succession to the throne?*

Philip the Fair, King of France, had three sons, Louis, Philip, and Charles, and a daughter Isabella married to Edward the Second, King of England, whose son was Edward the Third, King of England. On the death of Philip the Fair, Louis succeeded him; Philip succeeded Louis,

and Charles succeeded Philip. On the death of Charles, the peers or nobles of France admitted Philip of Valois, the cousin of the deceased Charles (he being a son of Charles of Valois who was a brother of Philip the Fair), to succeed to the throne, passing over Isabella and her son Edward; whence followed the most bitter wars between the kings of England and France.

For Philip of Valois against Edward of England it was claimed that by the Salic Law and the immemorial custom of France women were excluded from the succession to the throne of France. Thus, for instance, on the death of King Childeric the Third, his two daughters were excluded and the throne conferred on Clotaire; and on the decease of Cherebert the Fifth, his three daughters were passed over and his brother Sigebert succeeded. And as women themselves are not capable of succeeding, they can not transmit a right to their sons. Secondly, Edward had done homage to Philip of Valois as King of France and sworn to be his liege, thereby recognizing him as king and renouncing his own right, if he had any, to the throne of France.

On the other hand, it was asserted that Edward had good cause to prosecute his right by force of arms. When the question was debated before the peers, his proctors were not admitted, but compelled by threats to withdraw. The Salic law, so often quoted by all historians and jurists, the chief foundation of the Valois claim (as Hotman recognizes), was a fictitious and ridiculous invention; since that law, which enacts that in Salic land no portion of an inheritance may pass to a woman, refers not to the French, but to the Salii, and, as the same authority admits, is so far from applying to royal inheritances that it can not even be referred to feudal successions, but only to allodial lands, which are in private patrimony.

Secondly, as regards custom, a custom contrary to the common law should not be presumed. In Spain, Portugal, Navarre, Sicily, Naples, England, Scotland, women were not excluded from the throne. In practically all the other dignities of France, as for instance in the duchies of Normandy, Brittany, Aquitaine, Burgundy, women succeeded. The precedents of Clotaire and Sigebert, who succeeded in preference to daughters, were not sufficient to found a custom, coming perhaps from times in which the throne was considered not so much hereditary as elective.

Finally, the homage rendered by Edward to the Valois was no obstacle to him, because it was done in his youth, and from the fear that the Valois might invade the Duchy of Aquitaine.

Froissart, and Walsingham, History of the time of Edward III; Chassanaeus, on the Customs of Burgundy, section 5, § 38; Hotman, Francogallia, ch. 10, and on the Succession in the Kingdom of France, ch. 2; arguments for either side in the archives of the Bodleian Library.

14. [13] *Whether a nephew by a sister is to be preferred to the son of an uncle in the succession to the throne?*

Martin, King of Aragon and Sicily, had an only son Martin, who died before his father, leaving an illegitimate son Frederick; he had also a sister of the full blood, Helionora, and a nephew by her, Ferdinand of Castile, and a kinsman James of Urgela, the son of an uncle John. On the death of Martin, the illegitimate Frederick, James of Urgela, and Ferdinand of Castile contended for the throne. They resolved to submit the matter to the decision of arbitrators. Arbitrators were chosen, three from Aragon, three from Valentia, and three from Catalonia, theologians, jurists, and others, all men of the highest wisdom and probity.

Frederick, the illegitimate grandson by a son of the deceased, contended that he was not altogether illegitimate, being born of a single father and an unmarried mother; the Roman Pontiff had declared him legitimate; and, moreover, he deserved consideration because he had recently, by a most decisive victory, added the kingdom of Sicily to Aragon. James, Count of Urgela, contended that he was a male, descended from a male; that females were excluded from the throne and could transmit to their children no better right than they had themselves.

Ferdinand of Castile contended that he was the son of a mother who had the deceased King Martin for her brother by both parents; and that, as the nearest in blood, he ought to succeed, both by natural law and by the laws of the land. It was not provided by the laws of Aragon that females should not succeed; they were only excluded when there were males and females in the same degree and equally near of kin.

The arbitrators, who, after duly performing the religious rites, had heard the advocates during thirty days, shut up in the citadel, which they were not allowed to leave except after declaring a king, at length came forth in public and, amid the most eager attention and expectation on the part of the whole people, pronounced Ferdinand of Castile King of Aragon.

Laurentius Valla, book II; History of King Ferdinand; Mariana, on Spanish Affairs, book XIX, last chapter, and book XX, ch. 2.

15. [14] *Whether, on a failure of the direct line, the head of the next line or the nearer in degree ought to succeed to the throne?*

After the murder of Henry the Third, King of France, the male descendants of the family of Valois failed; and it was admitted that the right of succession to the throne belonged to the Bourbon line, whose head and chief was Henry, King of Navarre, son of the late King Antony, whose brother Charles, Cardinal Bourbon, was also surviving. Accordingly, the greater part of the nobles having recognized Henry of

Navarre as the lawful successor to the throne, the members of the Holy League or Union declared Cardinal Bourbon, as being nearer of kin, king under the title of Charles the Tenth. As a supporter of his right and title they secured a certain Zampini, who published a pamphlet arguing that Cardinal Bourbon, after the death of Francis, Duke of Anjou, who was a brother of Henry the Third, Antony of Navarre being already dead, ought to succeed to the prerogative of first prince of the blood. Antony, dying in the lifetime of the Duke of Anjou, never attained to the prerogative of first prince of the blood, and therefore could not transmit to his son Henry any right to such prerogative, because in the hereditary succession of self-successors, agnates, and cognates, even in feudal and royal succession, the nearest in degree to the deceased person, whose succession is in question, is to be regarded as heir; and accordingly the cardinal, as nearer to the Duke of Anjou, ought, on the death of Henry, to be preferred to the King of Navarre, who was of a more remote degree.

For Henry of Navarre, Hotman and others argued that Zampini, being an Italian, did not understand the distinction between heir presumptive or apparent to the throne and first prince of the blood. The heir apparent to the throne was a son or brother of the king in the same line, as Francis, Duke of Anjou; the first prince of the blood was the first in the next branch or line, as Antony, the father of Henry, to whom under that title the administration of the kingdom had been committed at the celebrated meeting of the Estates of the Realm. Neither in the succession of the heir, nor of the first prince of the blood did degree or age in another line confer any prerogative.

No one doubted that in the first line, that of Valois, the principle that the son of the first-born excluded an uncle had been observed. Why then should not the same hold good among agnates of the next line, which succeeded to the place of the first, seeing that the agnates of a king derive the cause title and right of succession, not from the last king, but from the common author and head of the family, called by the Greeks "*genarchos*" and by the Latins "*progenitor*"? And this, it is said, was supported by the law which ordained that on the death of a king the succession to the kingdom should devolve on his first-born son, or if he was already dead, then on the son's son; and if the king should die without issue, and there should be a failure of heirs male of that line, then that the succession should pass to the next line of the royal family, the same order of primogeniture being preserved.

De Thou, book XCVII, 1589; Camden, Elizabeth, 1589; Zampini, on the Succession of the prerogative of First Prince of France: Reply to Zampini, by P. E. A. (Frankfort, 1589); Hotman, on the Right of Royal Succession, law 4; Choppin, on the Domain of France, book II, ch. 12.

16. [14] *Whether on the death of John William, Duke of Cleves and Juliers, the right of succession belonged to the Duke of Saxony, the Margrave of Brandenburg, or the Duke of Neuburg?*

On the death of John William, Duke of Cleves and Juliers, without issue, the right of succession to both duchies was claimed by the Duke of Saxony, the Margrave of Brandenburg, and the Duke of Neuburg. The Duke of Saxony claimed on the ground that a hundred years before, on the celebration of a marriage between John, Duke of Cleves, and Mary, only daughter of William, Duke of Juliers, the duchies of Cleves and Juliers were united by the emperor, with the consent of the Estates of either duchy; the issue of that marriage were William, Duke of Cleves, Sybil and other daughters; and Sybil married John Frederick, Duke of Saxony, on condition that if John and Mary should die without male issue, the whole inheritance should descend to Sybil and her husband John Frederick and their heirs. Hence, as John William (to whom the succession had descended from William, brother of Sybil) had died without issue, and his father had left no issue other than daughters, he contended that the right to succeed had devolved on himself, as the heir descended from the marriage of John Frederick and Sybil.

The Duke of Brandenburg relied on the following right: William, Duke of Cleves and Juliers, the father of the deceased John William, had four daughters, Mary, Anna, Margaret, and Sybil; and decreed, with the concurrence of the Estates, that if he should die without male issue Mary (whom he had betrothed to Albert, Duke of Brandenburg) and her heirs should succeed to the duchies. The claimant himself had married the elder daughter of Mary and Albert, who in this case was manifestly the heir.

The Duke of Neuburg asserted that his father Louis had married Anna, the second daughter of Duke William, and that the Emperor Charles the Fifth had granted as a special privilege that if William and his heirs should die without male issue the principality should go to his daughters, and on their deaths to their heirs male; and therefore, since Mary, the first daughter, died before the Duke John William, and left no male heir surviving her, the right to succeed passed to his mother Anna, and from Anna to himself her male heir.

The Prince of Deuxponts, who had married Margaret, William's third daughter, and the Margrave of Burgau, who had married Sybil, his fourth daughter, resolved, in view of the contest of the three more powerful princes for the whole inheritance, to stand by until it should appear what was decided between them.

As the duchies were fiefs of the empire, the Emperor Matthias issued an edict summoning all claimants whomsoever to trial before himself. The Princes of Brandenburg and Neuburg, however, fearing the bias of the Emperor in favor of the Duke of Saxony, agreed together

that the dispute between them should be settled by the Estates of Cleves and Juliers, and in the meantime they committed the ordinance and government of the country to the Estates. The Emperor, indignant at this conduct, sent Leopold, Archduke of Austria, secretly to Juliers; who having entered the city, acted as the Emperor's lieutenant, built fortifications in the city, and sent for military forces from outside. The Prince of Anhalt, coming with troops from France and from the United Provinces of the Netherlands to the assistance of the Princes of Brandenburg and Neuburg, compelled Leopold to withdraw into Germany and his garrison to abandon the city.

The party of the Emperor and the Duke of Saxony was supported by the King of Spain and the Archduke Albert, princes of the House of Austria, the bishops, electors and some princes of the Reformed Religion in Germany. The cause of the Dukes of Brandenburg and Neuburg was upheld by the kings of France and England, the Estates of the Netherlands, the Prince Palatine of the Rhine, and other princes of the Reformed Religion in Germany. When everything was looking towards war, it was agreed, through the intervention of the electors of the empire and others, that the Duke of Saxony should be admitted with the Margrave of Brandenburg and the Duke of Neuburg to the right of possession in the disputed dominions, a right which he obtained in form rather than in reality.

Subsequently secret rivalries and suspicions gave rise to dissensions between the Dukes of Brandenburg and Neuburg; and it was believed that the Duke of Neuburg, in order to gain a powerful kinsman, married the daughter of the Duke of Bavaria and, in order to win the favor of the Emperor and the Catholic princes of Germany, embraced the Roman religion. Afterwards, when these dissensions broke out in war, the Duke of Brandenburg sought help from the United Provinces of the Netherlands, and the Duke of Neuburg from the Archduke Albert.

These events happened at the time when the King of Spain and Albert had made a truce for twelve years with the Estates, but each side retained its army. Accordingly the Marquis Spinola with the soldiers of the King of Spain on one side, Prince Maurice of Orange with the troops of the United Provinces on the other, invaded the duchies, and occupied the towns and principal places, taking possession of them on behalf of the rights of the Princes of Brandenburg and Neuburg respectively; but finding them convenient for reasons of their own, they appeared by no means ready to give them up; which caused Cardinal Bentivoglio to say that weaker princes should beware of the plan of inviting into their dominions the assistance of those more powerful than themselves.

Belgian History, book XVII; Cardinal Bentivoglio, Narrative of the movement of arms in the affair of Cleves-Juliers; Discourse on the succession in Juliers, and Reply to the same, by anonymous authors (Frankfort, 1615).

SECTION IV.

Of Questions of Duty between those at Peace.

Questions of duty between those at peace include questions of the Privileges of Civil Congress and Embassy; also questions of Civil Convention and Treaty, and the Word of Honor and Oath which are added thereto.

1. Whether it is becoming in princes to dispute about place and precedence?

Lactantius says that nothing is more shameful or more arrogant, and nothing more remote from the principle of wisdom, than to dispute about dignity; and many authorities show that in the negotiation of momentous matters the place of sitting often raises a keener contention than do the matters themselves. Moreover such disputes sometimes appear foolish and idle, as in the story, which Warszewicki relates, of the ambassadors of two princes of Italy who met on a bridge at Prague, and neither would give way to the other; so they stood practically the whole day, and made themselves the laughing-stock of all.

On the other hand it is maintained that God is the author of rank, and that it is not inconsistent with humility to regard distinction of degree or rank; and jurists lay down that it is lawful to defend a prerogative of rank and seat by armed force. The public safety and interest, however, should be the first consideration. Thus when a dispute arose in a battle against the Persians, between the Arcadians and Athenians, as to which nation should fight in the front place at Platæa, the Athenians are commended because, in that common danger of their country, they preferred to give way, saying that wheresoever they should be posted, they would show themselves brave men.

Besold, on Precedence, ch. 3, §§ 7, 8; Nolden, on Nobility, ch. 15, § 1, 55.

2. Whether the higher place is due according to the number or according to the eminence of dignities?

There have often been disputes between the kings of France and Spain about the prerogative of seat and precedence. In the year 1556 the Spaniard, having failed to obtain it at the court of the Pope, persuaded his kinsman, Maximilian the Second, to deny the prerogative of the chief place to the ambassadors of Charles the Ninth at the imperial court; which was regarded as so signal an insult that Admiral Caspar Coligny, according to De Thou, strenuously urged the King of France that the cause was sufficient for making war on the Spaniard.

For the Spaniard it was argued that his sway extended in length and breadth further than that of all the other princes of the whole of Europe. For the French king, that the Kingdom of France, its parts being closely united in a continuous circle, and one in language and customs, was in no way inferior in might to the Spanish Empire. Number of titles does not enhance majesty; for when the Emperor Charles the Fifth, in a letter to Francis the First, King of France, added as his titles a recital of numerous provinces and dominions, the King of France wrote in reply, "Francis, by the Grace of God King of France, and Lord of Gonesse," which is almost the smallest village of the whole kingdom, implying that he reckoned the Kingdom of France by itself alone equal to all the provinces of the empire.

Besold, on Precedence, ch. 6, § 6; Bodin, I, 9, § 145; du Moulins, on The French Monarchy; Nolden, on Nobility, ch. 9, §§ 74, 179; Vasquez, in the preface to Famous Controversies.

3. *Whether the higher place should be conceded to one who holds a greater or to one who holds a more ancient dignity?*

At the conference of Bologna, in the year 1600, between the ambassadors of the Queen of England and the King of Spain, a question arose as to priority of place in sitting and in walking. The Spaniard's first argument was, as usual, the length and breadth of his dominions; to which it was replied that no one should be preferred on account of a plurality of dignities, if none of these of itself was sufficient to give him precedence. Secondly, the Kingdom of Castile, the title of which the Spaniard places before the rest, was recent compared with the Kingdom of England, for it had counts, not kings, before the year of Grace 1017. Thirdly, in the Book of Ceremonies of the Roman Curia, which, as the canons say, as lady, mother, and mistress, gives the rule to others, the first place among kings is appointed to the King of France, the second to the King of England, and the third to the King of Castile. Fourthly, in the Councils of Constance, Siena, and Basel, the King of England held the second place. Fifthly, Julius the Second, the Roman Pope, had pronounced in favor of Henry the Seventh, King of England, against Ferdinand of Castile.

Camden, Annals, 1600; Robert Wingfield, on the precedence of the Kingdom of Britain in the Council of Constance; Pierre Matthieu, History, book VII, 1, § 12; Meteranus, Belgian History, book XIII.

4. *Whether an inferior prince who is present in person should be preferred to the ambassador of a superior prince who is absent?*

As a general rule it has been established by custom that the same honor in all respects should be paid to ambassadors as would be offered to those by whom they are sent, if the latter were present; and Paschal constantly maintains that ambassadors are the second or twin persons of

the princes who send them. He excepts only the prince to whom the embassy is sent, for it is right that he should occupy the higher place in his own dominions. Conrad Braun, however, mentions that in Germany electors who are present are preferred to the ambassadors of those who are absent, and he says that he himself observed this among the princes. A passage in the Golden Bull, Title 25, supports this. With this, too, agrees the testimony of Colerus that in the assembly of Nuremberg in the year 1542 the ambassadors of Charles the Fifth were placed after his brother Ferdinand; and Sleidanus mentions that the Duke of Cleves, being present, refused to give way to the ambassadors of the Elector of Saxony, who was absent. The explanation is held to be that in a prince present there is actual majesty; in an ambassador, only borrowed and fictitious dignity. Or possibly a custom, differing from the customs of other nations, has grown up in Germany from the constitution of the Golden Bull.

Paschal, Ambassador, ch. 38; Braun, on Embassies; Besold, ch. 5, § 6.

5. [9] *Whether an inferior king ought to give place to a superior, who has been elected, but not yet confirmed?*

When the ambassadors of Charles the Fifth, King elect of the Romans, and of the King of France met at Calais in the year 1521 Antonio del Prato, a celebrated jurist and Chancellor of France, raised a question of precedence against Mercurinus, Chancellor of Charles the Fifth, on the ground that Charles had not yet received unction from the Pope, maintaining that on that account he ought to give place to the French King, as having been already anointed. On the other side it was argued that an emperor, declared elected by the electors, had all the powers which he had after Pontifical coronation, and that the dignity befitting his powers ought also to be his.

Besold, on Precedence, ch. 2, § 4; Arumaeus, on Public Law, dissertation 1, at the end.

6. [10] *Whether in conferences and letters the title of "most serene" should be given to those who are not kings?*

In the negotiations at Bologna, when the instructions of the Queen of England gave the title of Most Illustrious, and not Most Serene, to the Archduke Albert, the ambassadors of the King of Spain obstinately declined to negotiate, unless the title of Most Serene should be added in the Queen's own hand wherever mention was made of the Archduke. It was argued that the title of Most Serene is proper to the emperor and kings alone, who are possessed of majesty; that dukes are merely noble, or at most illustrious. On the other hand, that majesty, in the sense of greater status or power, does belong to dukes; also that against them the crime of treason may be committed, and that many dukes recognize no superior.

Camden, Annals 1600; Rudolphinus, on the dignity of the Dukes of Italy.

7. [11] *Whether those who have not supreme power may send ambassadors?*

Elizabeth, Queen of England, refused to receive Christopher d'Assonleville, who was sent to her as ambassador by the Duke of Alva, because he brought no letter from the King of Spain; and when the Genoese nobles sent Stephano Mario and Bartolomeo Comellino to Philip, King of Spain, Talicarne, of the opposite party in the Genoese Republic, intervened, saying that private persons could not send ambassadors. It is, however, certain that Appius Claudius the prætor sent ambassadors to Hieronymus, son of Hiero, Scipio to Syphax, Lucullus to Tigranes, and Cæsar to Ariovistus. Paschal refers these cases to the greatness of the Roman Empire and says that the governors of great provinces bore themselves as the equals of kings; and further he says that such embassies on matters of common interest, being necessary between coterminous provinces, are allowed when there is no time to consult the supreme power; but he does not think they should be reckoned among legitimate embassies. He says that in the same way the princes of Germany and the Free States have the right of sending ambassadors on matters which concern themselves.

Besold, on Embassies, ch. 3; Paschal, The Ambassador, ch. 13.

8. [12] *Whether religious persons and clerks should be employed on civil embassies?*

Boccalini, in the Parnassian Satire, mentions a certain Zeno, a Stoic with all the gravity of his sect, who approached the shrine of Apollo to offer honor and salutations to the god, before, as he said, setting out on a long journey, he having been appointed by the Prince of Cnidos to undertake an embassy about important business; on hearing which, Apollo reproved the Prince of Cnidos, who was present at the time, for sending on an embassy, after the fashion of some, a person of no magnificence, in order to save expense. Zeno, however, indignantly objected that he and others of the same order went on embassies, contrary to the profession which they make of avoiding above all things the business of courts, and that on them they did not shrink in the service of princes from doing many things which were forbidden by honesty; so that they appear to have deserved the censure of Tacitus, who said that the sect made men into turbulent busybodies.

Under the head of Stoics there is no doubt that religious persons and clerks are included, with which agrees Comines, who records that it was formerly the custom in Spain to transact all business with foreigners through religious persons or monks, either because they knew best how to pretend, or in order to save expense. But not only do the ecclesiastical canons strictly forbid monks or clerks to mix in temporal business, but

the Apostle too warns us that no man who serves God should involve himself in secular business. Campanella, however, a skilful statesman, recommends that ecclesiastical persons should be used for all business, because they are more prudent and cautious, and because, being celibates, they are less likely to gratify personal feelings. And Pierre Matthieu highly extols religious persons and monks for services rendered with happy result to great princes at variance in purpose, or at war with one another, and relates that Saint Bernard went to Mainz to reconcile the Emperor Lothaire with the Emperor Conrad, and that an Augustinian, Conrad Sineta, negotiated peace between the Venetians and the French. The Roman Pope, intervening between Henry the Fourth of France and Philip the Second of Spain, used the services of Bonaventura of Calatagirone, General of the Franciscans, to bear holy and salutary exhortations of peace to either king. Moreover, Father John Ney brought about the truce in the Netherlands, and Hiacyntus, a Capuchin, not very long ago acted as ambassador in the most important negotiations of the Christian world.

Boccalini, Scales of Parnassus, I, 3; Conrad Braun, VIII, 3; Comines, VIII, 16; Pierre Matthieu, History of the Peace; Besold, ch. 4, § 4.

9. [13] *Whether embassies may be intrusted to women?*

When the Sabines were making war with great ferocity on the Romans, because the latter had forcibly carried off the virgins who had come to see the equestrian games, the Senate decreed that as many of the Sabine women as were free should leave their children and go on an embassy to their countrymen; which they did, with the result that peace was made, and a wonderful thing, says Florus, followed; for the enemies left their homes and migrated to a new city, and shared their ancestral wealth with their daughters' husbands as dowry.

Kirchner, however, denies that the Sabine women went on an embassy, because the laws of Rome prohibit women from performing the duties of men. And the edict of the prætor expressly forbids women to plead on behalf of others, because it is contrary to the modesty becoming their sex. Caia Afrania, the wife of the Senator Licinius Buccio, gave the occasion for this edict; who, not because she was without advocates, but because she was a woman of unbounded impudence, assailed the tribunals continually with screams, never before heard in the Forum, so that the name of Afrania came to be cast as a reproach on shameless habits in women. And the jurist Martian lays down that those who have no right of pleading can not go on an embassy.

Paschal, however, contends vigorously against Kirchner's view, and shows that honorable women have pleaded causes with approbation; as when the Order of Matrons was burdened with a heavy tribute by the Triumvirs, and no man dared to lend them his advocacy, and Hortensia,

daughter of Lucius Hortensius, pleaded the cause of the women before the Triumvirs persistently and successfully; for, recalling all her father's eloquence, she secured the remission of the greater part of the money demanded.

Indeed, on some occasions women have been considered eminently suitable for undertaking embassies. When the Senate at Rome debated whether Veturia and Volumnia with other matrons should be sent with an embassy to Coriolanus and the Volsci, who were threatening the city, and the matter was discussed at great length until evening, no one doubted, says Dionysius of Halicarnassus, that the office was one appropriate to women, but some feared that the enemy, by disregarding the Law of Nations, and detaining the matrons and their children, might obtain possession of the city without the hazards of a war; the view, however, prevailed of those who thought that the mother, wife, and other matrons should be allowed to leave the city and undertake the embassy; and when Valeria was persuading Veturia, the mother of Coriolanus, to undertake the embassy, she said:

"If you bring back your son to the city, you will win for yourself immortal glory, by rescuing our country from its great peril; and our honor among men will be the greater for having averted a war which of themselves they could not repel; and we shall be held true descendants of those women who under Romulus averted the Sabine War by the embassy which they undertook, and by reconciling leaders and peoples made this city great instead of small."

Ayrault, on Embassies, ch. 21; Valerius Maximus, VIII, 3; Paschal, ch. 20.

10. [14] *Whether an embassy should be decreed for a private cause?*

When Phrynon, an Athenian, was returning from the Olympic contest, he was captured by certain followers of Philip and robbed of all his money. On his return to Athens, he asked the Athenians to decree him an embassy to Philip with the object of recovering what he had lost, and it is said that the people granted his request. By the law of the Twelve Tables such an embassy was forbidden in the following words: "Let no man be an ambassador for his own objects"; and Cicero bitterly attacks such ambassadors, maintaining that nothing is more shameful than for a man to be sent as ambassador otherwise than in the interests of the state. When such an embassy was granted at Rome, it was called a "free" embassy, because it was not limited in time or place, nor liable to render account of its actions. Plutarch records that an embassy of this kind was decreed to Scipio Nasica, in order that he might remain in Asia, whither he was setting out, with greater security and honor, because, should he remain at Rome, he feared the fury of the populace, who were enraged at the murder of Gracchus. Nay, even Cicero earnestly desired for himself an embassy of this kind, as a period

of freedom and leisure, in order that being free from every anxiety he might be the better able to devote himself to study; and Manutius shows that senators were sometimes obliged to procure some such relaxation, since otherwise they were not allowed to be absent from Rome.

Gentilis, on Embassies, I, 8; Paschal, ch. 13; Besold, on Embassies, ch. 2, § 3.

11. [15] *Whether ambassadors should be permitted to take wives with them?*

When Zemosthenes Charmoleus, a Massilian, went on embassies for his country, he took with him his wife Lydimacha, although an ill-favored woman; and Isdigune, an ambassador to Justinian, from Chosroes, King of the Persians, took his wife and daughter with him on that embassy. Others, however, consider the society of their wives both inconvenient and dangerous for ambassadors and rely on the same arguments as those which Severus Cinna used, when he proposed in the senate that no magistrate, to whom a province had fallen, should be accompanied by his wife. Not indeed for nothing, said he, had it been decided of old that women should not be dragged to allies, or foreign nations; the company of women invariably hampered peace with luxury, war with fear, and turned a Roman column into the likeness of a barbarian procession; the sex was not only weak and unfit for toil, but, where wantonness was added, cruel, scheming, and greedy of power. All the worst of the provincials at once attached themselves to such women, who took in hand and managed affairs.

Others, however, take the view of Valerius Messalinus, who replied to Cinna. In many respects the harshness of the ancients had given way to better and happier rules, but little had been allowed to the needs of women, who are no burden even on the homes of their husbands, still less on allies; other things they shared with a husband, nor was there any hindrance to peace in this; and what more honorable thing for men returning after their labor than a wife's consolation? Granted that some were led astray into scheming or greed. What of magistrates themselves, were not many of them the victims of one passion or another? yet it was not on that account proposed to send no one to a province. Husbands were often corrupted by the vices of their wives; were all therefore to remain unmarried? it was vain to call our own sloth by other names, for the husband was to blame if a woman erred. Moreover, because of the weak will of one or two, it was ill to wrest from husbands the fellowship of their wives in good fortune and in bad, and at the same time to leave a sex, which was by nature weak, exposed to its own temptations and the lusts of others; it was difficult to keep the marriage tie intact, even with protection at hand; what would it be if it were destroyed during several years by what was practically a divorce? When they had

to deal with sins committed elsewhere, let them always bear in mind the wickedness of the city, and so on.

The jurists too lay down that ambassadors, like magistrates, may take their wives with them at their own risk; as to which Ulpian says that it is better for a proconsul to go to a province without a wife, but he may go with one if he knows that the Senate, in the consulship of Cotta and Messala, resolved that account and satisfaction is to be exacted from the husbands for any offense committed by the wives of those who go out as public officers.

Tacitus, Annals, III; Paschal, ch. 33; Besold, on Embassies, ch. 4, § 11; Digest, I, 16.

12. [16] *Whether an embassy may be executed by some of the ambassadors only?*

When Constantianus, one of the ambassadors from Justinian to Chosroes, was detained by sickness, Sergius, the other ambassador, refused to enter Persia; on the other hand, when disease had carried off Callicrates, an ambassador of the Rhodians, Diæus, the other ambassador, went on to Rome. And of many Indian ambassadors to Augustus, three only, according to Strabo, reached Rome and executed their embassy, the length of the journey and other hardships having carried off the others. Paschal says that it is as clear as day that the ambassadors who are not prevented may act for the others; so, too, in regard to provincial ambassadors it was provided by law that, if obliged, they might employ another to execute the embassy. So the Roman ambassadors, who were sent to Jugurtha when he was besieging Adherbal, as soon as they landed at Utica, sent a messenger to him with a letter in which they intimated that they had been sent to him by the Senate and bade him come to the province with all speed.

Paschal, ch. 31.

13. [17] *Whether admission may ever be refused an ambassador?*

The Romans announced to the Ætolians that if ambassadors came they would be treated as enemies; and they told the ambassadors of Perseus that it would not be safe for them to come; and Coriolanus threatened to treat as spies any who came to him. Gentilis, indeed, maintains that it is lawful for a prince or people to forbid embassies to come to themselves, because otherwise a stranger might establish himself on a strange soil against the will of its lord; but they ought to see that such prohibition is made for some good cause. Grotius says the Law of Nations does not order that all ambassadors should be admitted, but forbids them to be repelled without cause. Just causes for refusing admission are:

(1) If the person sending the ambassador is unworthy; whence Justinian refused to receive the embassy of Totila, who was always treacherous; and Polybius relates that the ambassadors of the Cynethenses, as being a wicked nation, were everywhere repelled.

(2) If the person sent is unworthy; whence Lysimachus refused to give audience to Theodorus, who was called the "atheist," when sent by Ptolemy.

(3) When the reason for sending the embassy is suspect; whence the Romans ordered Perseus not to send to Rome, but to Licinius.

Gentilis, II, 5; Grotius, II, 18, § 3; Paschal, chs. 36 and 41; Besold, on Embassies, ch. 4.

14. [18] *Whether an ambassador can go beyond his instructions in the public interest?*

The Athenians punished with death the ambassadors whom they had sent into Arcadia, although they returned home successful, on the ground that they had traveled by a different route from that which had been ordered them; and when the consul Attilius, who had been sent by the Senate into Greece to protect the Athenians and the Ætolians against Philip, stormed and sacked Hestiza and Anticyra contrary to the instructions of the Senate, the Senate, when the news reached Rome, decided that Flaminius should be sent at once to succeed Attilius.

Sometimes, however, it is advantageous to the commonwealth that an ambassador should be of a versatile mind and use other methods than those which have been prescribed, to gain the same end. Thus when the State of Lampsacus, in order to appease Alexander, who was threatening them with all manner of evil, sent Anaximenes, a man well-known both to his father Philip and to Alexander himself, and the King, knowing his purpose in coming, called the gods of the Greeks to witness that he would do the exact opposite of what he asked, Anaximenes, having heard of this, when he came into the King's presence, said: "I beg you, O King, by the gods and our friendship, to reduce the wives and children of the people of Lampsacus to slavery, to destroy their city, and to spare not even the temples of the immortal gods"; and his prayers so prevailed that Alexander pardoned the state.

Valerius Maximus records that the ambassadors sent by the Senate to Tarentum to demand restitution, having met with very grave insults there, and one of them having even been bespattered with urine, on being introduced into the theatre, discharged their office in the words which they had received and made no complaint of what they had suffered, in order not to say anything beyond their instructions. Not so scrupulous, however, about his instructions was the Carthaginian ambassador who openly declared in the Senate at Rome that his toga had been stolen from him ten times since his arrival there.

Paschal, chs. 56, 57, 58; Besold, ch. 7, § 3.

15. [19] *Whether a prince is bound by what his ambassador does beyond his secret instructions?*

Ferdinand and Isabella, King and Queen of Spain, refused to consider as binding a peace made by the Archduke of Austria, their son-in-law, who had very wide instructions, on the ground that he had made the agreement contrary to his secret instructions. This was wrong, says Gentilis, and unbecoming in a prince, whose pen and tongue should be one; whereas these princes had two pens and two tongues; and, what was more intolerable, one of the pens and one of the tongues was unknown to the enemy; if this practice were to be admitted, there could be no certainty in making a treaty.

Grotius takes the following view: In a general agency it may happen that our agent binds us by acting against our will as signified to him alone; because here there are distinct acts of will, one by which we bind ourselves to regard as valid whatever he does in a given class of matters; the other by which we bind him to ourselves not to act except according to orders known to himself, but not to others. This must be noted, he says, in regard to promises made by ambassadors for kings which are covered by their commission of agency, but exceed their secret instructions.

Guicciardini, VI; Gentilis, III, 14; Grotius, II, 11, § 12.

16. [20] *Whether an ambassador should be allowed to conduct the causes of subjects of his king?*

Ships laden with merchandise and goods, belonging to subjects of the King of Spain, once put into English harbors; and when a suit was started concerning them in the Court of Admiralty in the name of those subjects, the King's ambassador wished to appear on their behalf. It was doubted whether he ought to be allowed to appear, because he had been sent here to manage the public affairs of his King; and because one who appears for others ought to have their instructions. It was replied that the affairs of subjects concern a prince, since it is to his interest that they should not suffer loss, in order that they may be richer and better able to bear public burdens: that any one can defend the absent without instructions, and appear against despoilers, and that the cases of the Spaniards were cases of spoliation.

Gentilis, Spanish Advocation, I, 18; Wesenbecius, Code, III, 16, 24.

17. [21] *Whether an ambassador may use lies?*

Henry Wotton, sent as ambassador for James, King of England, to the Venetians, was asked, while passing through Germany on his way, to write a token in the album of a certain nobleman and wrote as follows: "An ambassador is a good man sent abroad to lie for his country." Scioppius, twisting this into a libel on the King, wrote that he had found

a weapon against the fame and reputation of the King not to be despised, for his ambassador to the Venetians, so far from concealing the fact that he had been sent abroad to lie for the King, actually boasted of it everywhere. To efface this insult, Wotton wrote to Mark Welser, the magistrate of Augsburg, that the definition was perhaps catholic enough to include even Legates a Latere, but he was surprised that Scioppius should open the records of friendship, and after eight years revive a stale joke and interpret it as though it had been written not merely seriously, but even boastfully, and that, not content with that, he should have tried by his jokes to bring into contempt the unsullied name of the best of kings, as though masters were bound to account for the jests of their servants.

Paschal writes on this question :

"I would have an ambassador rely on truth, the most certain of the virtues, and her faithful comrade reticence. Yet I am not so simple or rude as to exclude the diplomatic lie altogether from the mouth of an ambassador. Assuredly if it is used so that error may be pardoned, vengeance foregone, or innocence assisted, the odium of the word will be forgotten, and the merit of the act alone remain. Certainly when other ways of helping a man in danger are closed, I hold it to be beyond doubt that this way, though crooked, should be tried."

"I think," says Diphilus, "that a lie spoken for the sake of safety does no harm." When Hannibal left Africa and crossed to the Island of Corcyra, he ordered himself to be described as a Tyrian ambassador when questions were asked. Xenophanes too, the head of the embassy sent by Philip to Hannibal, used means of escape of this kind; for these ambassadors, while making for Capua, were carried into the midst of the Roman guards and brought before Marcus Lævinus, the prætor, who was encamped about Nuceria. There Xenophanes boldly said that he had been sent by King Philip to the Senate and People of Rome, to enter into friendship and alliance with the Roman People.

Sometimes an embassy, such as that of the Gibeonites to Joshua, is designed for no other purpose than to tell a lie: and this is pardonable if the purpose of the lie is not the destruction of those to whom it is addressed, but the safety of those who use it.

Wotton, Letter to Welser; Paschal, ch. 54; Besold, on Embassies, ch. 4, § 6.

18. [22] *Whether security is due to ambassadors from others than those to whom they are sent?*

The ambassador of Philip, King of Macedon, having been sent with a letter to Hannibal with a view to making an alliance, was arrested and brought to the Roman Senate, but dismissed unhurt: but, as Justin says, only in order that a hitherto doubtful enemy might not be turned into a certain one. For the Law of Nations on the security to be afforded to

ambassadors does not apply to those through whose territories ambassadors pass on their way to others without permission. However, if they are ill-treated, the dignity of him who sends them, or of him to whom they are going, is offended and friendship is endangered.

Gentilis, II, 3; Grotius, II, 18, § 5; Ayrault, on Embassies, ch. 18; Besold, ch. 5, § 18.

19. [23] *Whether security is due to an exile sent as ambassador to his own prince?*

Perseus, King of Macedonia, sent an Illyrian exile as ambassador to Gentius, King of the Illyrians. Gentilis says that it is quite clear that if an exile returns to places forbidden to him, he may be punished, and that the title of ambassador does not help him. If the Illyrian suffered no harm, it must be ascribed not to the law, but to the circumstances of the case; in this question of embassies the strict letter of the law is often somewhat relaxed; and if Gentius received the exile as ambassador, he could not refuse him the rights of embassy, when he had once been received. Yet our own Edward Coke, a great master of the law of his country, but not equally learned in that which holds with foreigners, says that if an exile is sent as an ambassador to a place from which he has been banished, he can neither be detained nor injured; and to confirm this he mentions that when Reginald Pole, who had been found guilty of treason and was living at Rome, was sent as ambassador by the Pope to the King of France, and Henry the Eighth, King of England, asked the King of France to send him across to England, he did not obtain his request. Pole, however, at that time was ambassador, not to the King of England by whom he had been proscribed, but to the King of France, to whom he was neither subject nor in any way bound. But afterwards, in the reign of Philip and Mary, when he was performing what was regarded as the most holy of embassies from the Pope, in order to win over the Kingdom of England, although two peers of the realm by royal command went as far as Brussels to meet him, yet he did not venture to enter the kingdom further than Dover, until the law of his proscription had been repealed in Parliament and he had been restored to all rights of nobility and country.

Gentilis, II, 10; Coke, Jurisdiction of the Courts, ch. 26; Godwin, Annals, 1537 and 1554.

20. [24] *Whether an ambassador may be sued in a civil action in the place where he is discharging his embassy?*

Gentilis holds that an ambassador ought to submit to judgment on any contract into which he has entered during the period of his embassy; either, as Julian says, that ambassadors may not be able to carry home with them the property of others; or else, to give the reason of Paulus, because otherwise no one would be willing to contract with them, and in

a sense they would be cut off from business relations. Although these views of the jurists refer to a provincial ambassador, yet the principle, when examined, shows that the same law should apply to more important ambassadors also. Paschal holds the same view, on the ground that ambassadors can themselves sue for loss which they have suffered during the period of the embassy. Grotius lays down the contrary rule, and says that the movable goods of an ambassador can not be taken as security or to satisfy a debt, either by process of judgment or by royal power. For an ambassador ought to be free of all constraint, whether touching things that are necessary to him, or touching his own person, in order that his security may be absolute; so that if he has contracted a debt he should be summoned to pay in a friendly way, and, if he refuses, application should be made to him who sent him as ambassador; so that in the last resort the process is the same as that used against debtors outside the jurisdiction.

Gentilis, II, 16 and 17; Paschal, ch. 37; Grotius, II, 18, §§ 9, 10.

21. [25] *Whether persons guilty of an offense may be taken out of the house of an ambassador?*

Certain Venetian citizens, Abondio, Cavazza, and Valerio, who had betrayed the secret counsels of the senate to the great injury of the State, on being detected, took refuge in the house of the French ambassador, and when their surrender was refused to the officials who demanded it, a boat with warlike equipment was posted in front of the house, and at length they were handed over and put to death. When the King of France learned of this, he refused for some time to admit the Venetian ambassador into his presence, and afterwards, when the ambassador approached him in public, he complained of the indignity of the action, and said that the Venetians would not take it with equanimity if his officials made the same outrage on the house of their ambassador. To which the Venetian ambassador at once replied that, if any were traitors to the king, he only wished they might be caught within the shelter of his house; he would at once hand them over, since he was sure that if he were to do otherwise the State of Venice would be far from approving of his conduct.

Paschal, who discusses at length the jurisdiction of ambassadors, holds the following view on this question: if the person demanded is accused of treason, or a very heinous crime, the house of the ambassador ought to be open to the magistrate seeking him; apart from such crimes he thinks that the house of an ambassador ought to enjoy a special privilege.

Grotius distinguishes between the staff or household of an ambassador, and others, and decides that if the staff commit some grave offense, the ambassador may be asked to surrender them, but they must not be

forcibly carried off; when this was done by the Achæans to some Spartans who were in the company of Roman ambassadors, the Romans cried aloud that the Law of Nations was violated. If the ambassador refuses to surrender them, satisfaction should be demanded from the prince who sent the ambassador, and if he refuses, war should be declared against him, as the abettor of the crime. But as regards others, he says, the question whether an ambassador has the right of asylum in his own house for any one who flees thither, depends on the grant of the prince to whom he is accredited. It does not exist by the Law of Nations.

Paruta, X and XI, 1541; Paschal, ch. 76; Grotius, II, 18, § 8.

22. [26] *Whether an ambassador who commits an offense should be sent back to his own prince?*

Although the ambassadors of Tarquin, who had stirred up sedition at Rome, deserved to be treated as enemies, yet, says Livy, the Law of Nations prevailed, with the result that they were not put to death. But when Philæas of Tarentum was performing an embassy at Rome, and found a way of approach to the Tarentine hostages, and by tempting them in frequent conversations and bribing the jailers procured their escape from custody, and fled with them on their journey, he was brought back with them, and having been brought into the Comitia, with the approval of the people, was beaten with rods and cast down from the Rock. With him, however, sterner measures were taken because he had been an ambassador of Roman subjects.

In another case, says Polybius, of an ambassador who had instigated hostages at Rome to escape, nothing was done beyond ordering him to leave the territory. After weighing the opinions of different writers on this point, Grotius seems to decide that if the ambassador's offense is such that it may be passed over, no notice should be taken; if the crime is more serious, and likely to lead to public injury, the ambassador should be sent back to the prince who sent him, with a demand that he should either punish or surrender him, as the Gauls demanded that the Fabii should be surrendered to them; but to meet an imminent danger, he may be detained and questioned, as the proceedings in the case of the ambassadors of Tarquin indicate. But if an ambassador is meditating armed violence, he may be put to death, not by way of punishment, but by way of natural self-defense.

Gentilis, on Embassies, II, 18, § 10; Paschal, ch. 74; a pamphlet styled "Quæstio vetus et nova"; Grotius, II, 54; Camden, Annals, 1571 and 1584.

23. [27] *Whether a prince may validly contract a marriage by proxy?*

The Emperor Maximilian, after having for some time sought the hand of Anne, Duchess of Brittany, in marriage, at length won the consent of the maiden, and the matter went so far that not only was the

marriage contract publicly celebrated by proxy, but the Duchess, as though actually wedded, was solemnly laid on the marriage bed, and the ambassador of Maximilian in the presence of a great many nobles placed his leg bared to the knee between the marriage sheets, such a ceremony being regarded as a consummation of the marriage. Charles, King of France, however, who desired no less to see the Duchy of Brittany united to the Kingdom of France, than to see the Duchess united to himself, with the venal aid of matrons and counselors, won the heart of the tender maiden to himself. He argued, firstly, that the contract of marriage with Maximilian was invalid because the Duchess, being a dependent and ward of the King of France, could not bind herself save by his authority and consent. Next he found theologians to declare that the fictitious mode of consummating the marriage was rather an idle invention of courts than a rite approved by the Church. In the end the Duchess, moved by reasons of this sort, and preferring to have a king in the flower of youth as a husband, rather than as an enemy, deserted Maximilian, and flew to the marriage with Charles. Thereafter it was said in jest that the bereaved Maximilian was so very cold a suitor that he thought it enough to marry by proxy, when by undertaking a short journey he might himself have settled the matter beyond all dispute. Others, however, better judges of the facts, held that a signal injury had been done to Maximilian, which, if his strength had been sufficient, would have afforded a most just cause for war and vengeance.

Bacon, History of Henry VII.

24. [28] *Whether a treaty may be made with those who are strangers in religion?*

Asa was reprov'd by the Prophet for entering into alliance with the Syrian; and Paul says "Be not yoked with unbelievers." Asa was reprov'd because he distrusted God; and Paul forbids marriage with idolaters, which threatens a greater danger, that difficulty may be thrown in the way of true religion. But it has always been lawful to contract a treaty with those who are strangers in religion to abstain from injuries. Also no reason can be found why it should not be lawful to enter into treaties of commerce and the like with the heathen for the common advantage. And so far as military alliance is concerned, it is well known that the Asmonæans made a compact with the Spartans and the Romans, with the approval of the priests and people. Yet an exception must be made if the heathen are likely to derive great increase of strength from such an alliance; much more if war is to be made on men of the same religion; thus Alexander says, in Arrian, that those who make war with barbarians against Greeks are guilty of a grave sin.

Grotius, II, 15, §§ 8, 9, etc.; Gentilis, III, 19; Bodin, V, last chapter; Guay, Alliances of the Most Christian King with the Turk justified against the calumnies of the Spaniards.

25. [29] *Whether a prince who has promised help is bound to supply it when he can not do so conveniently?*

In the year 1585 it was agreed between Elizabeth, Queen of England, and the United Estates of the Netherlands that the Queen should send auxiliaries of horse and foot, under a general, and during the war should pay their wages, which the provinces were to repay when peace was restored; in the meantime certain cities and fortresses were to be handed over to the Queen as security. In the year 1595 the Queen declared by Thomas Bodley, her ambassador, that England was drained of men and resources by the long war; she therefore demanded that they should relieve her of the burden of expenses for the troops and repay some part of the expenses incurred. The Estates promised to refund a part of the money and, when she demanded the greater part, they contended that by the terms of the contract the money was not to be refunded until the war was finished and that, if the Queen regarded her honor, she could not draw back from the agreement. She took the view, on the other hand, on the opinions of jurists and statesmen, that every convention, although sworn, must be understood to hold only while things remain in the same state; that a man is more strongly bound to his country than to a private promise; and that princes are not bound by their contract when the contract results in public injury. Bodley persuaded the Estates, afraid to anger so mighty a princess, to promise to relieve her as soon as possible from all the expense which she was incurring on the English auxiliaries and to pay £20,000 for some years.

Camden, Annals, 1585, 1595, and 1598.

26. [30] *Whether privileges of commerce or business, which have been agreed upon with foreigners, may be revoked?*

The Hanseatic States complained to the Emperor and the Estates of the Empire, in the year 1595, that privileges once granted by the Kings of England had been annulled. Queen Elizabeth replied, by Christopher Perkins, that these privileges, having been abused, and for other reasonable causes, had been abolished by parliamentary authority in the reign of Edward the Sixth, as unsuited to the times; that in fact they had been granted when shipping and trade were depressed in England, and for that reason their enjoyment had been altogether forbidden in Mary's reign; that the Queen in the first years of her reign had for a time granted them certain others, as the times demanded, until they themselves, without the slightest warning, and for no reason at all, had expelled the English from Hamburg (showing no regard to friendship); that afterwards, however, she had determined to grant them the same conditions of doing business as the English had, but that they had altogether refused them unless they could obtain better terms; although it was not elsewhere the custom, nor was it to be endured, that aliens

should be preferred to natives in the trade of those articles which are peculiar to a country, which was what they were claiming under the privilege.

Camden, Annals, 1597.

27. [31] *Whether a treaty which contains provisions as to allies is to be extended to future allies?*

After the war about Sicily between the Roman people and the Carthaginians, a treaty provided that the allies of each people should be secure from the other. The Romans after the treaty enrolled the Saguntines as allies, whom Hannibal afterwards attacked. Livy says that provision had been made for the Saguntines, the treaty having excepted the allies on each side; for the treaty did not say, "those who were allies at the time"; and as new allies might be taken, who could think it right that those who were received into allegiance should not be defended? Grotius, however, thinks that future allies were not included, because the questions involved were whether a treaty had been broken, which is an odious matter; and whether the Carthaginians were to be deprived of the liberty to coerce by arms those who were thought to have done them injury, which is a natural liberty and not lightly deemed to have been given up.

Grotius, II, 16; Gentilis, I, 22.

28. [32] *If allies are at war, to which side should assistance rather be given?*

Demosthenes thought that the Athenians ought to give help to their allies, the Messenians, against the Spartans who were also their allies, if the wrong began on the side of the latter. If the members of a league engage in hostilities with one another for unjust causes on both sides (as may be the case), no assistance should be given to either side; if they are at war with others, that is with people who are not members of the league, each having a just cause, if help in men or money can be sent to both, it should be so sent. But if they ask for the presence of him who has promised help (which is a thing indivisible), reason demands that preference should be given to the one with whom is the older treaty.

Grotius, II, 15, § 13; Bodin, V, last chapter; Gentilis, III, 16, etc.

29. [33] *Whether successors are bound by a treaty?*

By a treaty between the Emperor Charles the Fifth and Henry the Eighth, King of England, in the year 1542, it was agreed that if the provinces of the Netherlands should be the scene of war, the King of England should supply five thousand foot-soldiers for four months. After Henry's death, when the King of France invaded Luxemburg, the Emperor demanded assistance from Edward the Sixth, King of Eng-

land, in accordance with the treaty; and although the King on certain other grounds was held free from obligation to afford it, yet it clearly appeared that a treaty is extinguished with the person of the contracting party. Thus the people of Fidenæ, after the death of Romulus, professed themselves freed from a treaty made with him; the Latins, after the death of Tullus, the Etruscans after that of Priscus, and the Sabines after that of Servius, claimed to be released from the bonds of treaties; and although treaties of peace and friendship may be considered perpetual, conventions of mutual assistance are considered more temporary, especially when some serious obligation is undertaken by the state. Grotius, however, draws the following distinction: if princes agree for themselves simply, the treaty is personal and is extinguished with the person of the contracting party; but if they promise for themselves and their successors, it is more lasting; as also if a clause is added that it is to be perpetual, or for a definite time, or for the good of the kingdom, or if the treaty is made with a free people.

Hayward, History of Edward VI.; Grotius, II, 16, § 16; Gentilis, III, 22; Ayala, I, 7, § 10; Bodin, I, 8, § 103.

30. [34] *Whether conventions and treaties between princes are interpreted strictly, or on principles of fairness and equity?*

Some say that there are no contracts "*bonæ fidei*," except those mentioned in the Civil Law, where contracts "*bonæ fidei*" are discussed. The passage of the Civil Law in question treats only of private law, not of public law, and the law which extends outside a state; but Tully says that equity is prescribed by the "*Jus Feciale*"; and Alciati, that in the contracts of princes more absolute good faith is required; and Baldus maintains that all dealings with princes or with the representatives of princes are "*bonæ fidei*," and that scrupulous interpretations and disputes about minute points of law are to be rejected, for these should be strange to those whose duty it is to regard truth alone, which the Law of Nations cherishes. And so Charles the Fifth and Louis King of France were blamed for advancing interpretations of words and agreements, which were worthy, not of princes, but of pettifogging lawyers.

Gentilis, II, 13; III, 14; Grotius, II, 16, § 10.

31. [35] *Whether an oath obtained by fraud is binding?*

Joshua and the Princes of Israel bound themselves by an oath to spare the Gibeonites, who pretended that they came from a distant region; which oath they also kept after they knew that they had been deceived. Grotius lays down the following principles: if it is certain that he who swore supposed something to be a fact which is really not a fact, and that, if he had not believed this, he would not have sworn, the oath will not bind him; but if it is doubtful whether he would not have

sworn the same oath, even without that belief, he must stand by his words, because an oath in the highest degree demands plain dealing; and we may conjecture that this was the explanation in the case of Joshua and the leaders of Israel. For the Divine law, which doomed them to extermination, was to be understood on the analogy of other law only to apply where persons did not immediately do what was commanded them. Wherefore, since it was probable that if the Gibeonites had revealed the true facts (which they did not do for fear) they would have obtained their lives on condition of obeying, the oath was binding.

Grotius, II, 13, § 4; Gentilis, II, 5; III, 19.

32. [36] *Whether an oath extorted by fear is binding?*

Cicero praises the tribune Pomponius, who kept an oath which he was compelled to swear by fear; so binding, he says, was an oath in those days. But although he who caused the fear obtains no rights, because he gave cause for the injury, none the less he who swore is bound to stand by his oath; thus we see that the Hebrew kings were upbraided by the Prophets because they had not kept the word which they had sworn to the Babylonian kings.

Grotius, II, 13, § 4.

SECTION V.

Of Questions of Wrong between those at Peace.

Questions of wrong between those at peace are questions in which, for example, we ask who are liable for wrongs? Or, again, is a thing an Offense against Status, Ownership, or Duty?

1. *Whether injuries inflicted by subjects affect a prince or people?*

When the Scyrians had assaulted some Thessalians who had come to trade, robbed them of their goods, and cast them into prison, the Thessalians on their escape brought the matter before the Amphictyons. They held that the injury must be punished as a public, not as a private, injury, because the Scyrians ought to have seen to it that strangers might do business among them in freedom and security. But when the governors of the Netherlands gave a number of persons letters of marque to take spoil from an enemy on the high seas, and some of them seized property of the Pomeranians, who were friends, and then throwing off their allegiance roamed the high seas, the Pomeranians on this ground made a complaint against the governors. But in this case Grotius advised that they were only bound to hand over the guilty parties if they could find them; and further to see to it that judgment should be given against the goods of the robbers; for that any one should be liable for the acts of his servants without any fault of his own was no part of the Law of Nations. So too the Rhodians in the Senate distinguished the public cause from the cause of private individuals, saying that there is no state which does not sometimes contain wicked citizens. One who knows, however, that his subjects are offending and has the power to stop them, and does not do so, is liable: thus Agapetus says in Justinian: "To offend, and not to stop offenders, is the same thing."

Ayrault, Decrees, II, 3, 1; Grotius, II, 13, § 20; III, 21, § 2; Gentilis, I, 21.

2. *Whether a wrong is to be imputed to a prince who receives one who does wrong elsewhere?*

Quintus Martius, the ambassador of the Romans, charged Perseus, King of the Macedonians, with a crime against the Romans, in having received the murderers of Arteratus, of all the Illyrian chieftains the most loyal to the name of Rome. Perseus replied:

"I am called upon to render account for the murder of Arteratus, although no charge is made except that his murderers are in exile in my kingdom. I will not refuse these unfair terms, if you in your turn agree

to confess yourselves the authors of the crimes for which any persons who have betaken themselves to Italy or to Rome have been condemned. If you and all other nations refuse this, I too will be among the others. And in heaven's name what avails it that exile should be open to a man, if the exile is nowhere to find a home? Nevertheless, as soon as I was warned and ascertained that the men of whom you speak were in Macedonia, I had them sought out and bade them leave the Kingdom, and forbade them my territories for ever."

Livy, XLII.

3. *Whether a fugitive guilty of an offense in his own country must be sent back by the prince of the territory in which he is found?*

When a certain Styward, a Scot, who had attempted to remove Mary, Queen of Scots, by poison, was apprehended in England, Edward the Sixth, King of England, delivered him into the hands of the King of France to suffer the penalty of his crime. This conduct was disapproved by some, because, although reason demands that one who commits an offense in his own country should be punished there, yet custom has established a different rule in the matter of sending him back there. And so when Edward Stafford, the ambassador of Queen Elizabeth to France, asked the King of France that Morgan and other Englishmen who were plotting against their prince and country might be expelled from France, he was informed in reply that if they were plotting in France the King would punish them according to law; but if they had plotted in England, the King could not legally take cognizance thereof; all kingdoms were open to fugitives; and every king was bound to guard the liberties of his own kingdom. Nay, Elizabeth not very long before had received Montgomery, the Prince of Condé, and others of French nationality; and at that very moment Ségur, the French ambassador, who was plotting to overthrow the French king, was finding a refuge in England. Accordingly, it has often been provided in treaties that subjects guilty of offenses should be sent back if demanded.

Hayward, History of Edward VI; Camden, Annals, 1584; Bacon, History of Henry VII, on the negotiations between Henry VII of England and Philip of Spain, on the question of sending back the Earl of Suffolk.

4. *Whether successors are liable for the wrong of a community?*

Arrian condemns the vengeance of Alexander on the Persians, since those who had wronged the Greeks had perished long ago; and Curtius passes like judgment on the destruction of the Branchidæ by the same Alexander. But it seems that punishment may be exacted for the offense of a community as long as the community lasts, because the body remains the same although its parts succeed one another. The contrary, however, is the better opinion, and for this reason, that on the death of those who brought the reproach on the community the reproach itself is extin-

guished, and therefore the debt of punishment, which does not exist without the reproach, is also extinguished.

Grotius, II, 21; Gentilis, I, 24.

5. *Whether a prince should avenge injuries received from his subjects when he was a private person?*

When Henry, third of that name, King of France, was returning from Poland, Hubert Lanquet, who was then living at Vienna, wrote as follows in a letter to Philip Sydney who was traveling in Italy:

"We shall see what this king will do when he returns to France; for all his friends say that he has determined to grant a generous pardon to all who have done anything to deserve his anger and to receive with favor all who desire it. I pray that he may mean what he says and may act up to it; but we know that no man drives away by noise the birds he wishes to catch in his snare. May he follow the example of his great-grandfather Louis the Twelfth, who, though many persons in the reign of Charles the Eighth had not only opposed him, but even brought him into peril of his life, yet frankly pardoned them all when he came to the throne; and, when his friends wondered that he did not avenge his many injuries, replied, 'Injuries to the Duke of Orleans do not touch the King of France.'"

Similarly Elizabeth, who had been imprisoned during the reign of her sister Mary, and was treated by Sir Henry Bedingfield with a severity unbefitting her rank, on her succession to the throne of England determined on nothing more severe than to bid him, when he deprecated her wrath, to return home in peace; adding that when she had need of a severe jailer she would send for him.

Lanquet, Letter 34, to Philip Sydney; Camden, Elizabeth, introduction; Foxe, Book of Martyrs, Queen Mary.

6. *Whether one who increases his strength or builds a fortress in his own territory offends against friendship?*

The Romans took up arms against Philip of Macedon, and Lysimachus against Demetrius for reasons of this kind; and some hold that by the Law of Nations arms may rightly be taken up to check a growing power, which when grown too great may do injury. Grotius, however, says that it is utterly opposed to the principle of equity that the possibility of being attacked should give a right to attack; and therefore a remedy should be sought in counter fortifications at home and the like, not in warlike violence. In another passage he maintains that to build fortresses in territories not for defense but for offense is inconsistent with friendship; and so is an extraordinary enlistment of troops, provided that it appears by sufficiently clear indications that these preparations are directed solely against one with whom there is peace.

Grotius, II, I, § 17; III, 20, § 40; Gentilis, I, 14.

7. *Whether it is contrary to friendship to receive the subjects of another?*

To receive individual subjects who desire to remove from one dominion to another, is not contrary to friendship, for such liberty is not only natural, but even favored. But it is not lawful to admit towns or large bodies of men, who make a new part of a state, just as it is one thing to draw water from a river, another to divert its course.

Grotius, III, 2, § 41.

8. *Whether passage should be refused to friends?*

When Agesilaus, returning from Asia, asked for passage from the King of the Macedonians, and the King said he would think about it, Agesilaus said, "Let him think about it, and meanwhile we will make the passage"; nor does it appear he acted over-harshly. Sometimes, indeed, it seems that passage may be refused; for example:

(1) If a passage of armed men is asked for; thus the Venetians refused it to Maximilian the First, who was seeking to go to Rome with an army to receive the Imperial crown, the Venetians pleading that an act of peace needed no armed men.

(2) Passage is lawfully refused to those who bring enemies with them; thus the Brundisians closed their gates on Antony, who brought an enemy with him; and the Carthaginians did the same to the son of Massinissa.

(3) If the passage is not asked for from the prince of the territory; thus when Cymon, about to bring assistance to the Spartans, led his troops through Corinthian territory, he was blamed by the Corinthians for not having addressed himself to the state. "But," said Cymon, "you yourselves did not knock at the doors of the Megarians, but broke them down, supposing that all things are lawful to the stronger."

Grotius, II, 2, § 13; Gentilis, I, 19.

9. *Whether the right of commerce may be forbidden to friends?*

The right of trading is not deemed to be refused when a particular mode of trading is not allowed, but only when trade is altogether prohibited.

(1) For instance there is no objection to a refusal to allow the importation of what the inhabitants deem wicked, or against religion, or against religious discipline; thus at one time merchants did not take to the Netherlands articles which tend to produce effeminacy.

(2) It also appears to be lawful to prohibit the exportation of certain things, such as gold or silver, to prevent provinces being drained of them; thus the Spaniards and the English place restrictions of this kind in some parts of their kingdoms.

(3) It is lawful to forbid trading so far as to refuse to allow merchants to have access to the more inland parts of a kingdom; thus in

former times the Britons, and at the present day the Sienese, are said not to allow this.

Gentilis, I, 19; Bodin, I, 7; Grotius, II, 2, §§ 11, 12.

10. *Whether the property of others may ever be taken against the will of the owners?*

One who is carrying on a war may occupy a place in the territory of another, if there is a clear danger of the enemy seizing the same place and inflicting injury therefrom. The Greeks who accompanied Xenophon, when they were desperately in need of ships, seized those that were passing; but they preserved the cargo intact for its owners and also supported the sailors and paid a price. But a question has also been sometimes raised whether one who requisitions the use of another's property is liable for its accidental loss. Thus when an English ship had taken in a cargo on the Etruscan coast, and was about to sail for England, it was unloaded by order of the Duke of Etruria and sent to the war, and while returning thence it was lost on the voyage. The English claimed to have the loss repaired by the Etruscans. In a similar case, when a ship which a prince took for his own use from his subjects had been lost by accident, the jurists lay it down that the prince was liable for the loss; and the case is far stronger when the subjects are those of others. The Etruscan, however, contended that he had hired the ship, and that a hirer is not liable for accidental losses; also that he had promised to guarantee against damage done by act of war; whereas the ship had not been lost at the war. The English reply was that the Etruscan had not in fact hired it, but compelled it by an act of sovereignty; and an act of this kind is rather of the nature of mandate than of hiring; and in law the mandator guarantees the mandatary against accidental losses. Agreement as to payment does not constitute hiring; for, as Tacitus says, payment by one who has power to command has the force of compulsion. Further, a promise to guarantee against loss incurred in an act of war does not exclude loss incurred in a similar manner, especially in a contract "*bonæ fidei*."

Grotius, II, 2, § 10; Gentilis, Spanish Advocacy, II, 26.

11. *Whether foreigners may ever invade the territory of another?*

If any part of the territory of another people is deserted, it may be occupied by strangers; since what is not cultivated is not deemed to be occupied by others. Thus the Ansibarians once declared that as the heaven has been given to the gods, so the earth has been given to the race of mortals, and whatever is unoccupied is public. Moreover, a habitation should not be refused to those who have been expelled from their own homes, provided they submit to the established authority and give the other guarantees which are necessary for the avoiding of sedition.

Grotius, II, 2, §§ 15, 17; Gentilis, II, 17.

12. *Whether aid may be given against allies to foreigners
who are oppressed?*

Those who say that citizens only are to be considered, deny that any consideration should be given to foreigners. These persons, says Cicero, destroy the communion and society of the human race. The Lazians indeed told the King of the Persians that he was not a just man merely by virtue of doing no unjust act, unless he also defended the unjustly oppressed; and thus they obtained from him an army and assistance against the Romans. Nevertheless we must consider whether a special society or alliance does not derogate from the claims of this general society. Thus when the Samnites, to whom the Romans were united by treaty and friendship, were pressing the Campanians, who were strangers to the Romans, in unjust war, and the Campanians being no match for their enemies fled to the resources and might of the Romans for assistance, the consul, by the authority of the Senate, replied to the ambassadors:

"The Senate, Campanians, regards you as worthy of assistance; but it is right to establish friendship with you only if it can be done without violating an older friendship; the Samnites are united to us by treaty, and therefore we refuse you the help of arms which would be a wrong to the gods rather than men. We will send ambassadors, as it is right we should, to pray our allies to do you no violence."

On receiving this reply, the ambassadors of the Campanians, as they had been instructed, spoke as follows:

"Since you will not guard what is ours, at least you will defend your own; we therefore surrender the Campanian people, the city of Capua, our lands and temples, all things divine and human into your power, Conscript Fathers, and into the power of the Roman people."

Whereupon honor seemed to demand that those who had surrendered themselves should not be abandoned.

Bodin, V, last chapter; Gentilis, I, 15; Grotius, II, 25, § 4, etc.

13. *Whether the promises in a treaty may ever be broken?*

If one party to a treaty has broken it, the other may abandon it; because each clause of a treaty has the force of a condition. Thus Thucydides says: "The blame of destroying a treaty lies not with those who, on being deserted, resort to others, but with those who do not afford the help which they have promised." Moreover, necessity or superior force will excuse one who is bound by treaty, and he is not to be regarded as a treaty-breaker.

Grotius, II, 15, § 15; Gentilis, III, 24; Ayala, I, 6, § 17.

SECTION VI.

Of Questions of War.

Questions concerning war are those in which some general point is raised, as, for instance, Whether any war is lawful? Whether a war can be just on both sides? Whether a war can be begun by those who have not full sovereign power? Whether a war should be undertaken for reasons not altogether just?

1. *Whether any war is lawful?*

Plutarch, in his Refutations of the Stoics, says that there is no war between men but is born of vice; some are born of the lust for pleasure, others of an excessive desire for wealth or power. Livy, however, says, that it is an accepted principle of the Law of Nations that arms may be repelled by arms; and the jurist Florentinus says that it is a part of the Law of Nations that we may repel violence and injury; and with this Hermogenianus and Gaius agree.

Grotius, I, 2; Gentilis, I, 15; Ayala, introduction.

2. *Whether a war can be just on both sides?*

A thing is called *just* either in respect of the act or in respect of the person acting. In respect of the act a war can not be just on both sides. But it may well be that neither of the belligerents acts unjustly. For none acts unjustly save he who knows that he is acting unjustly. Thus two persons may go to law justly, that is, in good faith, on each side. But in embarking upon a war, the gravity of the matter is such that, not content with probable reasons, it demands reasons of the greatest clearness.

Grotius, II, 23, § 13; Gentilis, I, 6.

3. *Whether war can be begun by one who has not supreme power?*

Gnæus Manlius was charged by his own officers with having made war upon the Gallo-Græci without the command of the Roman people; and Cato gave it as his opinion that Caius Cæsar ought to be handed over to the Germans because he had attacked them in the same unauthorized way. The Germans, however, says Grotius, had no right to demand his surrender; but the Roman people had a right to punish him. Just as the Carthaginian replied to the Romans:

"I do not think that we have to inquire whether Saguntum was attacked on the decision of an individual or of the state, but whether it was attacked rightly or wrongly? For this is our question and complaint, and we have a single matter of dispute with you, namely, whether or not it was allowed by the treaty."

Grotius, I, 3, § 5; Gentilis, I, 3; Ayala, I, 2, § 7.

4. *Whether a war may be begun for a cause of long standing?*

Polybius and Livy blame Hannibal because when he was about to begin a war against the Romans he did not put forward as the reason for war the loss of Sardinia, but other reasons connected with Saguntum, which were idle and unreasonable. Gentilis, however, does not indorse their opinion. For although, he says, the real cause of war was that the Carthaginians felt as a disgrace the loss of the command of the seas and the seizure of the islands, yet these wrongs were a matter of past history. And he approves rather the decision of Hannibal, who started a war against the allies of Rome for a recent cause, namely that they had succored his enemies and given them refuge. In the same way, he says, the Romans alleged as their cause of war against Philip, King of Macedonia, not the wrongs which he had formerly done them, but the existing state of Greece (as Zonaras tells us), giving as the cause of their action that Philip had invaded Greece, though of course the real reason was their old wrongs.

Gentilis, II, 22.

5. *Whether Elizabeth, Queen of England, justly assumed the protection of the Netherlands against the King of Spain?*

In the year of Grace 1575, the United Estates of the Netherlands, by ambassadors, offered Holland and Zeeland, either as possessions or as territories to be protected, to Elizabeth, Queen of England, she being a princess descended from the princes of Holland. After giving the matter her mature consideration, she replied that nothing was dearer to her than to keep faith, which was bound up with honor, and worthy of a prince; and it was not yet clear to her how, consistently with her honor and without doing violence to her conscience, she could receive the offered provinces into her possession or protection. On the other hand, she would use all her influence with the Spaniard towards the happy conclusion of peace. Later, in the year 1585, envoys from the same estates entreated her more urgently to accept the dominion of the United Provinces of the Netherlands, and to undertake the protection and championship of their people, who were suffering a most humiliating oppression. Elizabeth at first refused the dominion and protectorate; but at length, after devoting her anxious care and thought to the matter, and herself considering the grievous cruelty of the Spaniards towards the people of

the Netherlands, and their hatred of the religion which she held; fearing also lest the power of the Spaniard might spread more dangerously than ever in territories which were almost contiguous to her own realm and conveniently situated for effecting an invasion of England, she resolved that religion called her to succor the persecuted people of the Netherlands, and prudence to take thought for the safety of the people committed to her charge by frustrating the disastrous machinations of her enemies. Accordingly she openly undertook the protection of the Netherlands.

The Spaniard had the less to complain of in this matter because in the year 1569, when the Butlers, brothers of the Earl of Ormond, together with certain others, had stirred up sedition in Ireland, the Roman Pontiff and the Spaniard had made a treaty with them to bring in their religion and depose Elizabeth from the throne of Ireland. And about the same time, when Norfolk was planning a revolution in England, the same king, encouraged by Pius the Fifth, who was burning with zeal to restore the Roman religion in England and at the same time to remove Elizabeth from the throne, had intended to despatch Chiappin Vitelli with an armed force from the Netherlands to England, and to that end had sent the Florentine Ridolfo, a papal emissary, with a sum of money to the Netherlands, as Girolamo Catena in his life of Pius the Fifth testifies.

Camden, Annals, 1575, 1585, 1569, and 1572.

6. *Whether subjects may conspire against the legitimate successor to the throne for reasons of religion?*

When Henry the Third, King of France, had no children, and the succession to the throne passed of right to Henry of Navarre and after him to the Prince of Condé, both champions of the Reformed religion, the Catholic princes of France, with the connivance of the Pope and the Spaniard, entered into a secret conspiracy, by the name of the Holy League or Union, for the purpose, under the cloak of defending the Catholic religion, of utterly rooting out the Reformed religion. Those who entered into this conspiracy bound themselves to one another by an oath that they would never suffer any one to reign in France who had professed or wished to profess any other than the Roman Catholic religion; and that they would never admit one who had been brought up in another religion, even though he should abjure it, lest having once gained the throne he should undermine the old religion. That every word of this oath was designed to exclude Navarre and his kinsman Condé, no one doubted. The supporters of the conspiracy argued that the right of succession to the throne by reason of blood depended upon human laws which the people could change; that in a successor other qualities besides nearness of blood should be regarded, lest one unfit to

govern should be advanced to the throne; that religion and the worship of God were the chief end of any state, and therefore that every one should guard against the admission of a prince who was without the pale of the true religion, and whom they suspected to be hostile to the worship of God.

On the other side it was maintained that though it might be that, in kingdoms where successors were supplied by election the people had a right to determine on fit persons, yet in kingdoms in which the succession depended upon hereditary right no one should be deprived of the right which belonged to him by blood. When Lysander proposed a law at Sparta that the most suitable person and not the nearest in blood to Hercules should succeed to the throne, he found no one, as Plutarch tells us, to support his proposal. And when there was a dispute between the brothers Hyrcanus and Aristobulus about the throne of Judæa, Pompey, to whose arbitration the case was submitted, as Josephus records, preferred Hyrcanus the elder, though less suitable, to Aristobulus, the younger brother. An unjust action should not be done in the name of religion. Ambrose, though he believed that Valentine, the son of Valentinian, would do injury not only to himself, but also to his flock and to Christ, yet refused to avail himself of a high state of popular excitement to offer resistance.

Camden, Annals, 1581; Parson (writing under the name Doleman), on Succession; John Hayward, Reply to Doleman; Grotius, I, 4, § 5.

7. *Whether reprisals are lawful?*

The Emperor Zeno says that it is contrary to natural equity that men should be molested for the debts of others; and in a novel of Justinian the retaliatory seizure of goods for the debts of others is forbidden, the reason being added that it is unreasonable that one man should be a debtor and another be forced to pay. It appears, however, to be a principle of the Law of Nations that the goods of all subjects are liable in respect of debts owing by a civil society, or its head, whether owing primarily on their own account or because they have made themselves liable by not enforcing the debt of another.

Grotius, III, 2, §§ 1, 2; Gentilis, I, 21; Ayala, I, 4.

SECTION VII.

Of Questions of Status between Belligerents.

Questions of status between belligerents arise when there is a doubt as to the condition of a prince, a people, or subjects in regard to a war, as, for example, whether certain persons are to be regarded as enemies, or whether men are to be regarded as unfriendly according to their origin or their domicile.

1. *Whether those who sin against nature should be regarded as enemies?*

Hercules, according to the narrative of Diodorus, compelled the ancient Gauls, who feasted on human flesh, to abstain from that custom; and Alexander subdued the Sogdiani, who had no respect for parents. Vasquez, Molina, and others, however, require for the justice of a war that he who undertakes it should have been injured or else that he should have dominion over the offender. But it should be recognized that kings have the right to demand satisfaction not only for wrongs done to themselves or their subjects, but also for wrongs to any person whomsoever, which are in flagrant violation of the law of nature or of nations; since the power of punishing is not merely derived from civil law, but comes from natural law also. Such wars, however, the object of undertaking which is to exact a penalty, may easily be convicted of injustice unless the crimes are very atrocious and very plain.

Grotius, II, 20, § 40; Gentilis, II, 2.

2. *Whether those who are strangers in religion should be regarded as enemies?*

Darius, King of the Persians, made war on the Carthaginians, who worshiped the gods with the blood of innocent men. And among other causes of the Peloponnesian war between the Athenians and the Spartans, one alleged cause was irreverence towards those whom they thought gods. Covarruvias, however, following others, says that a war can not be justly undertaken to punish offenses which are committed against God; but it is settled that the following persons may be restrained in the name of human society. (1) Those who worship devils or wicked men; (2) Those who deny that there is a Deity or that He cares for human affairs; (3) Those who persecute those who profess Christianity. Thus Constantine made war on Licinius and other emperors on the Persians because they subjected Christians to penalties. On the other hand it is

agreed that an attack can not justly be made on those who do not embrace the Christian religion, because men can not be won over to that religion by natural arguments; still less on those who profess Christianity but are in doubt or error on certain points, which are either outside the Law of Christ, or seem to have a doubtful meaning within it.

Grotius, II, 20, §§ 44, 45; Gentilis, I, 8, 9, and 10.

3. *Whether one who is an enemy subject by origin, but resides among friends, should be deemed a friend?*

A citizen of Milan, complaining of a wrong done him by Florentines, was denied justice at Florence. The question was, whether, when the right of reprisals had been granted against the Florentines, it was lawful to seize the goods of a man who, though born at Florence, had dwelt for some time at Rome? And it seems that it was not; because reprisals can not lawfully be granted except against those who are in fault, and fault does not appear to attach to the absent; and further because, when a man has a double capacity, as of origin and domicile, that which is favorable to him should rather be regarded, especially in a question of reprisals, which, though sometimes allowed, are yet never to be regarded with favor. Others, however, except from the rule the case of one who resides elsewhere, but contributes to public burdens in his state of origin, in his own person or through his family.

Bartolus, on Reprisals, question 7.

4. *Whether one who is a friendly subject by origin, but is domiciled among enemies, should be regarded as an enemy subject?*

At a time when the English and Venetians were on friendly terms with one another, an Englishman, who had been granted the right of reprisals against the subjects of the King of Spain, seized the goods of a Venetian who dwelt in Spain. Baldus, for the reasons mentioned in the preceding case, says they were seized unlawfully; Bartolus, on the other hand, relying on the distinction already alluded to, asserts that persons born elsewhere are, with other subjects, liable to reprisals if they contribute to public burdens with them. With him agrees Grotius, who writes that by the Law of Nations all the subjects of one who does a wrong are liable to retaliatory seizure, who are subjects in virtue of a permanent cause, whether natives or immigrants, but not those who are merely passing through or are there for a short stay. For retaliatory seizures were modeled on the burdens which are imposed for discharging public debts.

Bartolus, on Reprisals, question 7; Grotius, III, 2, § 7; Francis Niconitius, on Digest, XXIV, 3.

5. *Whether those who are setting out to join the forces of enemies may be treated as enemies?*

When the Lanuvians were proceeding to help the Latins against the Romans and, as soon as they had left their own gates, heard that the Latins had been beaten, and so returned immediately into the city, they were nevertheless informed by their governor that they would have to pay a great price for so short a march. And when Caius Pliny consulted the Emperor Trajan as to his decision in the case of two slaves who had been arrested among the recruits, whether the penalty of the law should be inflicted on them (a point on which he was himself in doubt), seeing that they had not yet been given a place in the ranks, Trajan replied that they should be punished, because the day on which they were approved demanded from them the truth of their origin.

Gentilis, however, took the opposite view in defense of certain Englishmen who were captured by the Dutch as they were on their way to regions belonging to the King of Spain, arguing that they should not be put to death. He maintains that it is wrong to regard as enemies those who have not yet been enrolled in the enemy's ranks, for this is required by the legal definition of soldiers; again the Englishmen were only conditionally intending to serve, that is, if the Spaniard should accept them; and where odious acts are in question a thing begun is not regarded as completed. The Lanuvians, he says, started in pursuance of a public decision, and thus became enemies as soon as assistance was publicly resolved on; and the slaves, of whom Trajan writes, were practically enrolled in the ranks on the day when they were approved, even though they had not yet taken the oath.

Gentilis, Spanish Advocacy, I, 9; Pliny, Epistles, book X, 38, 39.

6. *Whether foreigners who serve with subjects against a prince should be regarded as rebels?*

When the Earl of Desmond and others had stirred up a rebellion in Ireland, Italians and Spaniards were sent to their assistance; who, after the Viceroy Grey had besieged them for some time, requested a parley. This was refused, because they had joined rebels with whom no parley could properly be held. Some, however, think that no one should be regarded as a rebel except one who has been a subject; others that all are rebels who engage in a rebellion, just as all are guilty of treason who abet a traitor, and all are guilty of the offense of piracy (even though in other respects enemies in the strict sense) who give assistance to pirates in a piratical ship.

Camden, Annals, 1580; Gentilis, Spanish Advocacy, I, 10; Julius Clarus, Opinions, book V, on Treason, §§ 6, 7.

7. *Whether the subjects of the King of Spain in the Netherlands, with whom he consented to treat as free, obtained immunity from his dominion?*

When on behalf of Albert and Isabella, Archduke and Archduchess of Austria, to whom Philip, King of Spain, had transferred all his rights over the provinces of the Netherlands, it was proposed to the Estates of the United Provinces to treat on the subject of a peace or truce, the Estates utterly refused, unless they were first recognized as free and independent; whereupon the Archduke and the Archduchess stated, in their own names and in that of the Catholic King, that they were prepared to treat with them in that capacity, recognizing the United Provinces as free, and claiming no right of dominion over them; and this was declared by the first article of the treaty, which was also approved by the King of Spain. Afterwards, when the Estates of the United Provinces contended that they were free, not only by the personal abdication of the King, but by the acknowledgment of the King himself, and of the Archduke and Archduchess, the following answer was given on behalf of the Archduke and Archduchess and of the Spaniard: the form of words used did not confer absolute liberty upon the provinces, but invested the persons conducting the negotiations with a certain capacity to negotiate, in the absence of which it would have been utterly impossible for them even to contract with princes; the latter had put off their majesty, only so far as those negotiations were concerned; the word "as" was often used to mark a comparison, not a reality; there had been no cession of the royal rights and no resignation, these being acts which, even in the disposition of private estates or property, were only effected by certain forms and solemn process of law; and after the commencement of the negotiations the Estates had raised the question of a further renunciation of sovereign power, and the President Janin, the ambassador of the King of France, had reminded them that princes were forbidden to impair their sovereign rights to the prejudice of their successors.

Baudius and Puteanus, on the Belgian Truce; Patricius Armachanus, French War, II, ch. 5.

SECTION VIII.

Of Questions of Ownership between Belligerents.

Questions of ownership between belligerents include disputes about particular acquisitions, as when single things are captured from enemies, pirates, or others: and about universal acquisitions, when territories or kingdoms are invaded or subjugated.

1. *Whether things captured from enemies become the property of the captors before they have been conveyed "within guard?"*

The jurist Gaius says that things captured from enemies become the property of the captors immediately by the Law of Nations; but it has been determined by the nations that a man is to be deemed to have captured a thing, who so holds it that the other has lost all reasonable hope of recovering it, as when movables have been brought within the territory, that is, "within guard." It appears to follow that ships or other property at sea must be held to have been definitely captured only when they are brought into docks or harbors or the place where the whole fleet is assembled. For then recovery begins to be despaired of. But, says Grotius, it seems to be a principle of the more recent Law of Nations in Europe that such things should be deemed to be captured when they have been for twenty-four hours in the power of the enemy. Pierino Belli and Gentilis do not approve of this view.

Grotius, III, 6, §§ 2, 3, 4; Belli, III, § 11; Gentilis, Spanish Advocation, I, 2.

2. *Whether things captured from enemies and brought into friendly territory should be restored to the former owners?*

Some Spanish ships, captured by the Dutch, were brought into English harbors; whereupon the Spaniards appealed to the Admiralty Court of England and demanded restitution of the ships and their cargoes, on the ground that the right of postliminium, by which things are restored to their former owners, holds, not only when a thing reaches its own territory, but, as the jurist Pomponius says, if it comes into an allied or friendly state, or to the country of an allied or friendly king, because there it first begins to be protected by the name of the state; and the King of England was at that time friendly to the King of Spain. Grotius, however, following Gamma, says that the rule does not apply without qualification to friends or allies with whom relations of peace exist; but only to those who espouse the same side in a war. For among those who

are friends, but do not espouse the same side, persons captured in war do not change their status, except by special compact. Thus in the second treaty between the Romans and the Carthaginians it was agreed that prisoners of the Carthaginians, belonging to peoples friendly to the Romans, who came into ports subject to the Romans, might be claimed as free; and that the friends of the Carthaginians should have a like right.

Gentilis argues against Gamma and Grotius, that there is a right of postliminium in any friendly state, which does not belong to the enemy's side, on the ground that the law speaks not only of an ally, but also of a friend, and that the principle of the law requires that postliminium should be possible whenever a man is in safety. The provision in the treaty between the Romans and the Carthaginians is not decisive against this view, because treaties often contain superfluous provisions on matters which would otherwise be legally secured.

Grotius, III, 9, § 2; Gamma, Decisions, 384; Gentilis, Spanish Advocacy, I, 1, 2; Besold, on the Law of Territory, ch. 3, § 4.

3. *Whether things should be regarded as captured which could not escape from pursuers?*

Some Maltese galleys, pursuing certain pirates, pressed them so hard that they were undoubtedly about to fall into the hands of the Maltese and had abandoned all hope of escape, when they were thrown ashore on the island of Corsica and captured by Corsicans. A question arose whether they ought to be restored to the Maltese; and Cephalus advised that a thing was said to be captured when it was impossible for it to escape capture, and concluded that the pirates ought to be restored to the Maltese, or else that the Corsicans were bound to pay their value; because they were the cause of the Maltese not attaining the end and reward of their labor.

Alciati agrees in the case of wild animals unable to escape; but Louis Molina says that ownership and possession belong to him who actually captures, since the blow struck by another is not sufficient to make him the captor. But if the blow of one was the cause of the other's capture, the striker certainly has a right, in virtue of having produced the cause, to have some profit and right in the thing captured.

Cephalus, Opinions, 36; Gentilis, Spanish Advocacy, I, 4.

4. *Whether the goods of those whose towns or lands are occupied by enemies may be plundered?*

In the war between the Emperor Charles the Fifth and Francis King of France, the French occupied many towns in the dominion of the Duke of Savoy. Thereupon the imperial troops seized the opportunity and plundered the goods of subjects of the Duke of Savoy as if they had been subjects of the King of France, on the ground that they appeared

to take the side of their enemies and to afford them aid. Pierino Belli, however, strongly disapproved of this conduct, because the Piedmontese, although supporting the French in their territories, and also affording them aid, must be presumed to have done so not voluntarily or from a desire to favor the French rather than the Imperialists, but under the compulsion and fear of those whom it was neither easy nor safe to resist; but compulsion and fear excuse fraud and negligence, and ought to give immunity from punishment or loss.

Belli, II, § 5.

5. *Whether the goods of friends may be captured on an enemy ship?*

It is commonly said that if a ship is liable to capture, the goods are also held liable. Grotius, however, says that the maxim that things found in an enemy's ships are deemed enemy property ought not to be accepted as though it were a certain rule of the Law of Nations, but ought merely to raise a presumption, which may still be rebutted by valid proofs to the contrary; and in Holland, in the year 1338, when war was raging with the Hanseatic League, it was so decided in a full Senate and passed from the decision into the law.

Grotius, III, 6, § 6; notes to III, 1; Consolato del Mare, ch. 237.

6. *Whether the ships of friends carrying the goods of enemies may be made prize?*

When some merchants of the Netherlands, adherents of the King of Spain, were in the habit of shipping cargoes secretly to Spain in English ships, the inhabitants of Zeeland, who pursued them with bitter hostility, in their indignation captured certain English ships engaged in this practice, and secured their condemnation by the judges of the Admiralty as lawful prize. The English complained of this, and succeeded in getting some ships of the Zeelanders which had put into English ports detained, and their captains imprisoned by way of reparation. The Prince of Orange, however, appeased the Queen, and it was agreed to restore the ships and persons captured on each side. The opinion of the judges is supported by the rule of the civil law by which a ship is forfeit, in which illicit cargoes are carried with the knowledge of the owner. And there is a French edict which enacts that if enemy goods are found in the ship of an ally, even the ship is lawfully confiscated. But it is more equitable to release the ships of a friendly power after removing their cargoes, unless they carry contraband, and by the Consolato del Mare, in which the law of the Mediterranean is contained, one who seizes enemy goods in a friendly ship is bound to pay freight for that part of the voyage which the ship has performed.

Meteranus, Belgian History, 1576; Morisotus, II, 10; Gentilis, Spanish Advocat-ion, I, 28; Grotius, notes to III, 1.

7. *Whether the property of friends may be intercepted on its way to enemies?*

Paul Dzialine, an ambassador of Sigismund, King of Poland, after handing a letter to Queen Elizabeth, after a custom unusual in England, retired to the lower part of the chamber, keeping his face turned towards the Queen. There in a loud voice he complained in the Latin tongue that in violation of the Law of Nations trade with the Spaniards had been forbidden by the Queen, and under color of such prohibition goods had been seized for her treasury. Accordingly he demanded that the goods which had been taken should be restored and free navigation to Spain permitted henceforth; otherwise, he declared, the Polish King would proceed to safeguard the interests of himself and of his subjects and cause those who were the authors of the injury to return to their senses.

The Queen immediately rebuked the fellow's audacity in these words:

"How have I been deceived! I looked for an ambassador; I have found a herald. I can not sufficiently express my amazement at such audacity and temerity. If your King gave you any such instructions, which I very much doubt, I think it must be because, being a young man, and not having been advanced to the throne by the ordinary succession of blood, but by election, he does not yet understand the proper handling of affairs of this kind, nor our own relations with his predecessors. You speak of the Law of Nations; but you ought to know that when kings are at war it is lawful for one side to intercept reinforcements or supplies sent to the other, and to see that no harm comes to them from that source. This, we maintain, is agreeable both to the Law of Nature and to the Law of Nations, and it has been the practice not only of ourselves, but also of the kings of Poland and Sweden in their wars with the Muscovites."

So spake the Queen. With this agrees the action of Demetrius, who, when he occupied Attica with an army intending to create a famine in Athens, captured a ship and its pilot, who was preparing to take in corn; and the Carthaginians captured certain Romans who brought supplies to their enemies, but gave them up on request. Grotius thinks that we should draw a distinction in the things carried; some things, such as mere articles of luxury, have no use in war, and this class gives no cause of complaint; others have use only in war, such as arms, and persons who supply such things to enemies are regarded as taking their side; and there are other things which have a use either in war or apart from it, such as money, supplies, or ships, and these may be intercepted if their carriage may hinder a surrender which is expected.

Camden, Annals, 1597; Grotius, III, 1, § 5, and in the notes to that passage; Gentilis, I, 21; Spanish Advocacy, I, 20.

8. *Whether when a particular article is contraband the material out of which that article is made may be intercepted?*

When arms or ships have been declared contraband, a question is raised whether if iron, out of which arms are made, or planks or timber, out of which ships are built, are carried, they are liable to forfeiture. This is doubtful, because we can not safely argue from the finished article to the material, and the scope of a penal statute or edict ought not to be enlarged.

On the other hand, it is decided that when there exists the same reason for prohibiting the material and for prohibiting the article, the same rule should apply to both, chiefly to guard against fraud. Hence the *Senatusconsultum Macedonianum*, which forbids a loan of money to be made to a *filius familias*, is extended to cover some things out of which money can be made, when the contract is tainted with fraud. It is the same when a prohibition is at common law, as for instance when the civil law forbids not only arms but also iron to be carried to the enemy; and the canons which do not allow galleys, that is to say, triremes, to be conveyed to the Saracens also forbid the conveyance of galley-stays, that is, the timber and planks out of which triremes are built.

Guido, Decisions, 371, § 2, Things which may not be exported.

9. *Whether when a particular thing is contraband, an accessory of that thing may be captured on its way to enemies?*

In a war between the Emperor and the King of France, the generals agreed that certain things might pass freely from side to side, arms of every kind being excepted. It happened that a certain merchant, on the Imperial side, among some licensed wares carried a hundred, or fifty, scabbards for sheathing swords, which were intercepted by the French because scabbards are as much a part of an enemy's equipment for military operations as swords. This, however, appeared hard, because wool and flax, which are necessary for soldiers' clothes, are not reckoned as contraband, and scabbards are only the garments of swords. The merchant, however, as Pierino Belli records, lost his wares, by camp-justice, he adds, which is often administered far away from books and not infrequently on slight consideration.

Belli, on Military Things, IX, 26.

10. *Whether contraband goods caught on the way to a hostile place may be captured as destined for enemies?*

A Genoese ship, laden with a cargo of great value, was captured on its voyage, charged with carrying arms and contraband goods to the Turks. Roderigo Suarez advised that the ship and goods ought to be restored, because the things had not been carried to the enemy and because there was no clear proof that the ship was bound for a Turkish

port. The jurists say that a judge must presume that a person intended to go to a prohibited place if he has been found on the confines of that place and off the route to the place to which he alleges that he was bound; and that one captured on the way is liable to be punished just as if he had reached the hostile place, because it is important that contraband goods should not be carried. Nicolas Boerius also mentions that a ship carrying contraband goods was captured on the voyage and condemned as lawful prize. Others draw a distinction as follows: if the penalty is referred to a verb in the past tense, as for instance, "if any one shall have carried," then, they say, the completed act is necessary; but if to a verb in the present tense, as for instance, "if any one carries" or "is found to be carrying," then it is sufficient that he has been caught on the journey.

Bartolus, on Code, XI, 1, 7; Boerius, Decisions, 178; Baldus, on Code, IV, 33, 3.

11. *Whether those to whom leave has been given to capture persons on their way to enemies, may capture persons returning from enemies?*

By a Spanish constitution, if clerks are caught bearing arms, they may be deprived of their arms by the secular judges; but if it is merely shown that they have borne arms, they are immune from those judges. It appears, however, that going and returning should fall under one and the same rule; though some distinguish the two by reference to the intention and purpose of the person giving the order. That is to say, if the right of capture has been granted in order to reward those who prevent the carriage of contraband goods, only those are entitled to the booty who effect the capture before the goods reach the enemy; but if the object is that the loss may deter others from attempting the carriage, then even the goods of those who have completed the conveyance may be captured as they return.

Code, VI, 1, 3; Bartolus, on Digest, XLI, 2, 3, 3.

12. *Whether the nicotine herb, commonly called tobacco, may be conveyed to enemies?*

At the time of the war between the King of the Spains and the Estates of the United Provinces of the Netherlands, certain English merchants despatched a ship laden with the nicotine herb, or tobacco, to a port of the Estates of the United Provinces; this ship with its cargo was intercepted by subjects of the King of the Spains on a charge of carrying contraband to the enemy. The English merchants sought to obtain restitution of the ship and cargo in the maritime court of the King of Spain. There the subjects of the King of Spain argued that the nicotine herb should be regarded as a food; at any rate by its use the consumption of food was protracted, and it ought to be confiscated on the same ground as salt, by which food is preserved from decay. On behalf

of the English medical evidence was offered, by which it was established that tobacco smoke is not nutritious, and the opinions of jurists were cited who asserted that although it might be that the goods of subjects could be made liable to forfeiture by mere parity of reasoning, yet those of foreigners and friends were not liable to confiscation unless declared contraband in express terms. Judgment was given in favor of the subjects of the King of Spain in his own maritime court, but the Englishmen appealed to their own King, who, after holding an examination of the case and taking the opinions of jurists, granted letters of reprisal to the English merchants against the subjects of the King of Spain, to recover and repair the losses which they had suffered.

Acts and Proceedings in the Court of Admiralty of England.

13. *Whether innocent goods are liable to forfeiture on account of illicit goods?*

Pierino Belli relates that a merchant who was carrying a number of scabbards for swords, together with other wares, had to forfeit not only the scabbards but the other wares also, which he redeemed for six hundred marks, on the pretext that innocent goods are liable to forfeiture on account of illicit goods. The jurist Paulus says that if anything is unlawfully put on board a ship in the presence of the owner, not only the cargo but the ship itself should be claimed for the treasury. Others distinguish between the case where the innocent and the illicit goods which form part of the same cargo belong to the same owner and that where they belong to different owners, and say that in the former case all are confiscated, in the latter only the property of the owners of the illicit goods.

Digest, XXXIX, 4, 11; Code, IV, 33.

14. *Whether because sailors do not lower their sails to a war-ship of another prince, the ship may be captured as prize?*

The captain of a French ship of war meeting a Hamburg ship returning from Spain, ordered the sailors to lower their sails; and when they refused to do so he attacked and compelled them, and taking the ship into France claimed that it should be adjudged to himself and his companions as prize lawfully captured. He argued that it concerned the dignity of a prince that the ships of other nations should show due respect to his ships carrying his flag; and that it was enacted by royal edicts that other ships should lower their sails to the King's ships on pain of capture. On behalf of the men of Hamburg it was argued in reply that in Spanish waters, where the French King claimed no right of empire, no respect was due to his ships; that the French edicts did not bind strangers, especially strangers who were ignorant of them; and that the people of Hamburg were allied with the Spaniards as they were with the French,

and that it was lawful for them to trade freely in Spain. Louis Servin, the royal advocate, states that the judge of the inferior court pronounced the capture of the ship lawful, but that the judges of the superior court, who thought the rigor of the law should not be enforced against foreigners and friends, pronounced for its restitution.

Servin, II, 11; Selden, The Closed Sea, II, 26.

15. Whether things recovered from pirates should be restored to the former owners?

It is clear that things captured by robbers and pirates never pass into their ownership. Javolenus expressly says that if a slave has been stolen by robbers, although he afterwards falls into the hands of enemies, and on their defeat in war is sold by the victors, yet the buyer can not become his owner by usucapion.

Ayala, however, inclines to the opinion that a thing which has been carried off by irregular enemies, and has afterwards come into the control of regular enemies, and then been recovered by the military prowess of the citizens or bought back in the way of trade, should not be restored to its former owner. He admits the validity of the opinion of Javolenus in the case of a slave, because of the right of postliminium, but not in other things to which that right does not extend.

Gentilis defends the opposite view and does not approve of the distinction between slaves and other property, since the principle of the law covers all things which have been stolen; and further other things (except certain things which can not be lost without disgrace) admit of postliminium just as much as slaves. With Gentilis agrees Grotius, who asserts that the Law of Nations does not allow robbers or pirates to alter the ownership of a thing; and for this reason the Athenians wished to treat Halonnesus, which had been wrested from them by robbers, and from the robbers by Philip, as restored and not given to them by Philip. Nevertheless he thinks that it is agreeable to natural law that one who has bought back a thing at his own expense should receive such a sum as the owner himself would of his own accord have spent to recover the thing.

Ayala, I, 5, § 40; Gentilis, Spanish Advocacy, I, chs. 12 and 15; Grotius, III, 9, § 16.

16. Whether in the sack of a city he who first entered a house, or he who afterwards caught a man hiding in the house, ought to receive the price of ransom?

When a certain city, as Pierino Belli relates, was being sacked, an ensign entered a monastery with his fellow-soldiers and plundered it, as military license allowed him to do. There was in the monastery a certain nobleman hidden in a secret cell, who, on the information of his

servant, fell into the hands of a captain, who entered the monastery afterwards, before the nobleman was found by the ensign. A question was raised as to which of them had the better right to the price of ransom. On behalf of the ensign it was argued that as he had been the first to enter the monastery, whatever it contained belonged to him, since the possessor of what contains is also regarded as the possessor of what is contained; and that, according to military custom, he who seizes a house is deemed to have seized everything in it. For the other side it was argued that things which are not apprehended, either physically or by the eye, can not be acquired by mere intention; and according to the opinion of the jurists, one who possesses an estate certainly does not possess a treasure which, unknown to him, is buried in it; and as to military custom, a private house is very different from a monastery because of the many different habitations contained within the walls of the latter. Pierino Belli records that judgment was given in favor of the right of the captain.

Belli, IV, 15; Digest, XLI, 2, 3, 3; and 2, 8; Gentilis, II, 16; Alciati, Opinions, V, 41.

17. *Whether one who provides a soldier with a horse ought to share the booty captured by him?*

The commander of a troop of Spanish horse met one of the men of his troop as the trumpet was sounding for battle. The man complained that he had lost his horse in a fight a few days before, and therefore could not take part in the coming battle; whereupon the officer bade him mount one of his own horses and follow him. The soldier mounted the horse and, amid the rout of the enemy, fell in with the general of the hostile army himself, whom he made prisoner and delivered over to the general of the Spanish army, who obtained from the captive twenty thousand gold pieces. The officer maintained that part of the price of this ransom was due to him, because the soldier had fought on his horse and could not otherwise have taken part in the battle.

Pierino Belli assures us that when he was at Brussels, at the court of the King of the Spains, he was consulted on this question and advised that the officer had on his side equity, which is specially regarded among soldiers, whose disputes should be decided by consideration of what is equitable and right; and therefore a man is bound beyond the terms of his agreement to do whatever one man ought fairly to do for another. The officer had also pleaded the camp-custom, that one who lends a horse should be admitted to share in the spoils. Belli, however, says that when he withdrew from the court he left the dispute undecided; but he afterwards heard that judgment was given against the officer, whether rightly or wrongly he does not clearly say.

Belli, IV, § 8.

18. *If a prisoner is captured a second time in a battle, to whom is the price of his ransom due?*

In a battle between troops of the Emperor Charles the Fifth and Francis, King of France, a French nobleman fell into the hands of an Imperial soldier, to whom he handed his sword as a token of surrender, and promised that he would not make his escape, but he remained mounted on his own horse, armed with a club. Shortly afterwards he fell in with another Imperial horseman, who wrested the club from him, and, loosing the reins on the horse's neck, led him off as a prisoner. A French force then coming up, the troop of Imperialists took to flight; and the bridleless horse followed the flying Imperialists of its own accord, until it reached the Imperial infantry, who checked the flight of their comrades, drove back the enemy, and captured the prisoner on the runaway horse. A question then arose as to whose prisoner he should rightly be considered; that of the first captor, to whom he had given his parole and his sword; or of the second, who had deprived him of his club and of the control of his horse; or of the foot-soldier, who had taken him prisoner for the third time as he was careering about.

Pierino Belli said that judgment ought to be given in favor of the foot-soldier; because as regards the first and second captors, it appeared that he recovered his original liberty by the onrush of the French and the rout of the Imperialists. Baldus, in a nearly similar case, distinguishes the cases where the first captor detains the prisoner in fact and where he trusts to his parole; and says that if he detains or leads him off for some time he is in fact and solely the prisoner of the first captor; but if the first captor does not detain him or lead him off, but releases him on parole, his words and promise do not prevent him from being taken prisoner by another. Pierino Belli, however, regards the distinction between one who is actually kept under personal restraint and one whose parole is accepted as immaterial; in either case, he says, he can not be taken prisoner by another, because one who is bound by parole is no less held in the custody of his captor than if he were under personal guard or in fetters. This rule, however, only holds good among soldiers serving on the same side, and when there is a presumption that the first captor retains possession of his prisoner by intention. There is nothing to prevent one who has been recaptured by his own side, that is, by the party opposed to the captor, or who has been abandoned, which is to be presumed from the act of flight on the part of his captors, from being taken prisoner afresh by another.

Belli, IV, 11; Baldus, on Code, VIII, 48.

19. *Whether a prince taken prisoner by a private soldier
may be detained by him?*

When Edward the Third, King of England, was besieging Calais, and David, King of Scotland, had invaded England with a large army, an army which was collected under the command of the Queen utterly defeated the Scots in a pitched battle. Their King was taken prisoner by a gentleman named John Copland and taken to the camp of which he was in charge. When the Queen heard of this, she wrote a letter to Copland, commanding him to bring the captured King to herself, to which Copland replied, that he would yield him to no one, man or woman, except the King. Accordingly the Queen in a letter to the King complained of Copland's contumacy; and the King sent for him to Calais, which he was besieging. Copland having presented himself, and excused his action, the King pardoned him and granted to him and his heirs lands to the value of five hundred pounds, but nevertheless he bade him hand over his royal captive into the hands of the Queen; which Copland on his return to England did, begging the Queen also not to be angry with him, with all gravity and submission.

Froissart, Chronicles, book I.

20. *Whether a city captured in war loses its rights?*

When Alexander overthrew Thebes, he found account books in which it was recorded that they had lent the Thessalians a hundred talents. This debt Alexander remitted, because the Thessalians had taken the field with him. Afterwards when the Thebans were restored by Cassander, they demanded the loan from the Thessalians and instituted proceedings before the Amphictyons.

Hotman argues on behalf of the Thebans that Alexander was not a universal successor to the whole estate of Thebes, but a particular successor to particular things, because conquerors only become owners of what they actually lay hands on; and also that the Thebans had recovered their former right by right of postliminium.

Gentilis, however, urges on behalf of the Thessalians that Alexander ought to be considered the universal successor of the Thebans, since Thebes was overthrown and in a sense suffered death, an opinion which had already been formed by Ayrault, who reviews all the arguments of Hotman and thinks that the Amphictyons gave judgment for the Thessalians.

Hotman, Famous questions, 5; Gentilis, III, 5; Ayrault, I, 9; Ayala, I, 5, § 41; Grotius, III, 18, § 4.

21. *Whether Ferdinand, King of Spain, justly occupied the Kingdom of Navarre after driving out its king, John d'Albret?*

When Louis the Twelfth, King of France, was attacking the Papal States in Italy, Pope Julius the Second urged Ferdinand, King of Spain, and Henry the Eighth of England, who claimed the Duchy of Aquitaine, to attack the Frenchman. In order that their forces might meet, it seemed convenient to the Spanish King to lead his army through Navarre, and he sent envoys to King John d'Albret to ask his permission. Failing to obtain it, he attacked and occupied the Kingdom of Navarre, its King, who was unprepared with troops and supplies, retreating with his wife and children to Bearn, on the near side of the Pyrenees.

Ferdinand's occupation of the Kingdom of Navarre is defended on the ground that a passage through the Kingdom which by the Law of Nations ought to have been granted him had been refused; for a similar reason Moses destroyed the cities of the Amorites, and Judah those of the Ephronites; moreover John, King of Navarre, had been excommunicated by the Pope and deposed from his throne, which had been transferred to the Spaniard, because he adhered to the side of the French who were enemies of the Roman Church.

On behalf of John d'Albret it is maintained that he owed allegiance to the King of France and that a great part of his possessions lay in France beyond the Pyrenees, which he would have lost by taking the side of the Spaniard; the Spaniard demanded not only permission for the passage of his army, but also, in order to insure its safety, the surrender of citadels and fortified places, which it would have been dangerous to give up to an armed force; and the censure of the Roman Pontiff, being without cause, was as unjust as the transfer of the throne without authority was foolish.

Similarly when Pope Alexander the Sixth presented the Western Indies to Spain, Attabaliba, King of Peru, said that one who so generously gave away other people's possessions must be signally foolish and impudent.

On the Spanish side: Antonius Nebrissensis, Navarran War; John Lopus, Claim to the Kingdom of Navarre; Antonius de Padilla, on Code, III, 34, 11. Against the Spanish contention: Charles du Moullins, Customs of Paris, § 41; Bodin, I, 9, § 120; Benzonius, History of the New World, III, ch. 3.

22. *Whether Philip the Second, King of Castile, justly ejected King Antony from the Kingdom of Portugal?*

Emanuel, King of Portugal, had sons, John, Henry, Louis, Edward, and a daughter Isabella. John succeeded Emanuel, but as he had no issue the throne passed to Henry the Cardinal. He, being old and childless, instituted a public trial of the question of the succession, in which appeared Antony, son of Louis, but regarded as illegitimate; Ranuccio Farnese, Duke of Parma, a grandson of Edward, through his daughter Maria; Catharine, Duchess of Braganza, daughter of the

same Edward, and Philip, King of Castile, a son of Isabella. Inquiry was made into the birth of Antony, and a decision given against him, adjudging him a bastard. Henry died before arriving at any decision on the succession, and the people elected Antony, son of Louis, as their King, and had him crowned. Philip the Second afterwards sent an army under the Duke of Alva, drove Antony out, and brought the whole of Portugal under his sway.

For Antony it was urged that Henry's decision adjudging him a bastard had been disapproved by the Pope; his father Louis had contracted a lawful, though secret, marriage with his mother, which for various reasons had never been made public, and this had prevented Henry the Eighth, King of England, from betrothing his daughter Mary to Louis; but even if Antony's birth was not quite legitimate, had not many natural sons succeeded their fathers, not only in Portugal, but in Castile and other countries? Moreover, if the male line of the royal family failed, the people of Portugal contended that the right of choosing a king passed to them.

For Philip it was argued that Antony's illegitimacy had been clearly proved; Henry's decision only failed to meet with the Pope's approval because the King, disregarding the Pope's authority, had given judgment in a matrimonial case; the alleged right of Antony was disapproved by every other member of the royal family; the people had no right to choose a king so long as any of the royal blood survived; and before Philip invaded the kingdom he took the opinions of jurists and theologians and adjured them in God's name and upon their honor to tell him truly what were the merits of his claim, and it was by their advice that he had asserted his claim to the throne.

Camden, Elizabeth, 1582. On the side of Antony: Declaration of the succession to the throne of Portugal (Antwerp, 1582), ch. 2; Discourse of the King, Don Antony, at Paris, 1607. On the side of Philip: Conestaggio, on the Union of Portugal and Castile; Antony Viperanus, on the Portuguese claim.

23. *Whether the Portuguese justly transferred the Kingdom of Portugal from Philip the Fourth, King of Spain, to John, Duke of Braganza?*

In the trial which King Henry instituted about the succession to the throne of Portugal, Ranuccio Farnese, Duke of Parma, the son of Mary, elder daughter of Henry's brother Edward, contended that as a matter of pure and simple law a king left as many rights of primogeniture as he did sons. When the first ended the second succeeded; when the second ended, the third; and so on; and accordingly as the lines of John, Henry, and Louis had failed, he as the son of Mary, Edward's elder daughter, ought to be admitted to the succession before the other claimants.

On behalf of Catharine, Duchess of Braganza, own daughter of Edward, it was argued, that if her father Edward had been alive at the time of Henry's death he would undoubtedly have been heir to the

throne; that Edward being dead the same right belonged to her as his surviving daughter; that she was nearer in degree than Ranuccio and ought to be preferred to Philip, who was the son of a sister, she herself being the daughter of a brother.

On behalf of Philip, King of Castile, son of Isabella (daughter of Emanuel) and the Emperor Charles the Fifth, it was argued that Ranuccio, Edward's grandson, and Catharine, his daughter, relied on the benefit of the right of representation, which was nothing more than a fiction of the civil law and did not apply to royal successions; that he, Philip, was to be preferred to Ranuccio as being nearer in degree, to Catharine as being of the nobler sex, and to both by priority of birth.

The Portuguese grew tired of a Castilian régime, and throwing off their allegiance to Philip the Fourth (grandson of Philip the Second, who obtained the throne by force of arms), raised John, Duke of Braganza, son of Theodosius and grandson of Catharine, to the throne.

The Castilians complained of this action as unlawful and wrong, on the ground that Philip the Second obtained the crown not only by right of blood, but also by that of lawful conquest; that all the Portuguese were bound by oaths to obey the rule of him and his heirs; and that the Duke of Braganza owed fealty to the present King for his duchy and was guilty of the basest ingratitude in turning his military power in the kingdom against the King.

The Portuguese on the other hand urged in their defense that Philip the Second obtained the crown by no right of blood, since the fundamental laws of the Kingdom did not permit foreigners to succeed to the throne; that a kingdom subdued by force of arms might win its liberty in like manner; that a possessor in bad faith can not acquire a title by prescription by any length of time, certainly not by sixty years; that the Kings of Castile ought not to expect the Portuguese to observe the oaths by which they promised obedience, seeing that they themselves did not observe the sworn promises made at the time of their inauguration, as was obvious when Margaret, Duchess of Mantua, was appointed regent of the kingdom, who, although of the royal blood, was still not within the specified degrees; when matters affecting the Kingdom of Portugal were not administered by a council of Portuguese in Spain, as they ought to have been, but at the will of the Castilians; and when Castilians were summoned to the Supreme Council of Portugal and even to the Councils of the Royal Estates. As to the Duke of Braganza, his promise of fealty to the King did not impair his own rights, nor ought he for the sake of the King's favor to have neglected his duty to his country; and many other arguments were used, which are reviewed by the author of "*Lusitania Liberata*."

For Ranuccio, Opinion of the jurist Patavinus; for Catharine, Opinions of jurists of Bologna and Perugia; for Philip, Michael de Aguirre; for the Portuguese, Antonius de Souza, Portugal Liberated, and the authors on both sides referred to by him.

24. *Whether Ferdinand, after being deposed by the Bohemians, justly occupied the Kingdom by force of arms?*

Ferdinand, son of Charles, Archduke of Austria, and cousin of the Emperor Matthias, was appointed successor to the throne of Bohemia at a meeting of the Estates at Prague, in the month of June 1617, and was crowned in the month of July. Afterwards, on the death of Matthias in the following March, the Estates deposed Ferdinand and elected Frederick the Fifth, Elector Palatine, as King.

The Estates of Bohemia maintained that the deposition was lawful because the right of free election belonged to them, as they proved by instances extending from A. D. 345 down to the time of the Emperor Matthias. The appointment of Ferdinand was subject to the condition (which he secured by writing) that he should usurp no authority during the lifetime of Matthias and that (as he bound himself by oath) he should make no attack upon the liberties and privileges of the Kingdom. Ferdinand, however, had interfered in the administration of the Kingdom during the lifetime of Matthias, had attempted to exterminate the Protestant religion, had brought in foreign soldiers to oppress the native Bohemians, and to the perpetual prejudice of the right of free election had entered into a compact with the Spanish King, the keenest champion of the Papal religion, for the transfer of the Kingdom. On behalf of Ferdinand it was contended that the right of election which the Bohemians enjoyed had always been confined to the families of the archdukes and kings, and that it had always been regarded in that Kingdom rather as a right of succession than of election; he had been legally elected and had done nothing to justify deposition; during the lifetime of Matthias he had done nothing except on the instructions of Matthias in order to compose disturbances; he had taken no action on religious grounds against those who professed the Augsburg Confession (who alone were tolerated in Germany); the Bohemians in the first instance took up arms against the Emperor Matthias and took advantage of his failing health to seize the fortress of Prague together with the scepter and crown of Bohemia and appointed directors to govern the kingdom; and the compact with the Spaniard as to the succession to the throne had been entered into with the consent of the Emperor Matthias and his own brothers (whose interests were concerned) for the public good, with a view, that is to say, of avoiding a war with a most powerful prince of the House of Austria, who was asserting a claim to the succession.

For Ferdinand, the Hereditary Right of Austria; Goldastus, on the rights of the Kingdom of Bohemia; for either side in various passages, Litura. On the other side, Information in the chancellery of Anhalt; Criticism of Litura; evidence of the Elector in the Bohemian cause.

25. *Whether the Emperor Ferdinand justly ejected Frederick, Elector Palatine, and his children from the Electorate and its dominions?*

The Emperor Ferdinand the Second condemned Frederick the Fifth, Count Palatine, for treason for having taken upon himself the government of Bohemia, deprived him of the Palatinate and the Electorate, and transferred his dignities and dominions to the dukes of Bavaria.

The following questions were raised: (1) Whether the Emperor could proscribe him without the consent of the princes of the empire; and (2) Whether he lawfully deprived the children as well as the father of the dignities and dominions. Those who take the Emperor's side maintain that he acted lawfully on the following grounds. An injury inflicted on Ferdinand, King of Bohemia, might be restrained by the same Ferdinand as emperor, since one who bears two personalities is not prevented from exercising the right and privileges attaching to each. In an obvious and notorious case there was no necessity to call together the Council of Estates or Princes; and the other Electors, at any rate the majority of them, had ratified the proscription.

As to the second question, not only at civil law (as Arcadius and Honorius enacted) are children deprived of the paternal inheritance and succession for the crime of treason, but by the custom of other nations (Italy, France, Spain, and England), for a crime committed by the father, the descendants lose their fiefs, since a tacit contract is deemed to enter into the delivery of the fief, by which the lord stipulates for the right of forfeiture, not only against the donee himself but also against all persons substituted to him, in the event of an offense involving forfeiture being committed.

Those who take the side of the Count Palatine argue otherwise. No law, they say, allows a man to act as judge in his own cause; by the constitutions and capitulations of the Roman monarchs, nay by those of Ferdinand himself, the Emperor was bound to summon a Council of Estates or Electors in the more serious cases; the princes of the Empire, by privilege, were subject to the judgment of none save their peers in cases which concerned their dominions or dignities; the Electors who afterwards offered their assent to the proscription were not assembled as a college, but gave their votes separately as individuals; and a judgment void in law was incapable of confirmation. As to the children of Frederick, the jurist Alphenus had given an opinion that one who had lost his civil rights deprived his children of no other part of their rights except what would have come to them from himself, but those which were not conferred by a father, but by nature, the state, or the family, remained to them unimpaired; the German fiefs differed from those of other kingdoms, inasmuch as in Italy, France, and Spain fiefs were part of the patrimony, and their holders might alienate, lose, and divert them from their

descendants; whereas in Germany fiefs, especially those of illustrious dignities, by provision of the fundamental law and the observance of immemorial custom, belonged to children and agnates in the sense that predecessors could by no act take away or transfer the right vested in them, since they descended in virtue of the original grant and investiture, not of inheritance from the father, and were benefices of the family, not of the father, and their holders had a right to them for life only; and so they were neither liable to be confiscated for treason, nor lost to the prejudice of the children by a regular war. This, it is said, was the decision given in favor of the children of the Marquis of Montserrat concerning certain feudal castles captured by the Duke of Bavaria and abandoned by their father for the sake of peace. And other arguments agreeable to the authorities and opinions of the most eminent jurists were adduced on the same side.

For the Emperor, the Imperial Ban, Imperial Justice; for the Count Palatine, the book of Nullity; the Mirror of the Ban; John Joachim à Rusdorf, Claim to the Palatinate.

26. *Whether the King of Sweden justly invaded Germany
with an army?*

When the Emperor Ferdinand the Second had secured the coronation of his son Ferdinand as King of Hungary and Bohemia, the princes of Germany, especially the Electors (as Baptista Burgus records), suspected that he intended also to raise him to the throne of the Romans; and accordingly, in order to prevent the Austrians from establishing a hereditary succession to the Imperial throne, the Spaniards from interfering unduly in the affairs of Germany, and the adherents of the Reformed Religion from being driven out of the German dominions, as they had been from Austria and Bohemia, they formed a plan to vindicate the liberties and privileges of the empire and to safeguard their religion by force of arms. Not being able to agree on any German leader, because no German would yield to another, and it being dangerous to levy soldiers in Germany under the shadow of the Emperor's power, they thought the better plan would be to place the troops under some foreign prince, superior in rank and dignity to the Germans, above all the King of Sweden, a champion of the Reformed religion, a man trained in war from his cradle, never defeated, and one who had quarrels with the Emperor. So promising him arms, money, and all necessities, they enticed the King into their country, in order that he might make war in Germany at the risk of others for his own glory.

The King of Sweden, Gustavus, however, in order that a lawful reason for his expedition might be published, issued a memorandum in Latin and German in which he enumerated the wrongs done to himself and his allies by the Imperialists; he had been treated with ignominy because he had raised the siege of Stralsund, and assistance had been sent

to his enemies by the Emperor. As wrongs he mentions (1) That the Imperialists had intercepted a letter of his to the Prince of Transylvania, thrown the messenger into prison, and published the letter, putting a false construction on its contents, to his discredit. (2) That when negotiations for peace were proceeding between himself and the Poles, they had left nothing undone to put obstacles in the way of a peace, by voluntarily offering assistance to the Poles, and by allowing them to enlist soldiers and collect arms in Germany, whilst forbidding the Germans to take the field for the King. (3) They had plundered his subjects who put in on the German coasts for purposes of trade, robbing them of their wares and confiscating their ships. (4) They had expelled the Dukes of Magdeburg and fortified all the places throughout Magdeburg and Pomerania, maritime and inland alike. (5) They had built a fleet to infest the Baltic, and Wallenstein, Duke of Friedland, had been appointed admiral or maritime general to the prejudice of his own rights.

As regards the city of Stralsund, the facts were these: having refused to admit the army of the Emperor, which had laid waste the adjacent country like an enemy, until instructions should be received from the Emperor, it was being closely besieged; and rather than appeal to the King of Denmark for protection, because he at that time was regarded as an enemy of the Empire, it implored assistance from the King of Sweden, who thereupon collected troops, raised the siege of the city, and saved it from the ruin with which the army of Wallenstein was threatening it, and thus preserved it safe and sound for the Emperor. Again when he learned that negotiations for peace were to be instituted between the Emperor and the King of Denmark at Lubeck, he determined to send his own ambassadors thither to plead the cause of the city of Stralsund. The King of Denmark readily received them, but the ambassadors of the Emperor repelled them with the greatest insolence and bade them be gone not only from the city of Lubeck, but from any German soil, under threat of the direst consequences.

As regards the assistance furnished to his enemies, the Duke of Holstein had been sent with an army under the Emperor's own standards, to help the Poles against the King; and afterwards an army was led into Prussia under a field marshal of the Emperor.

A letter dealing with these points was addressed by the King of Sweden to the Electors of the Empire, before his soldiers invaded Germany, to which the Electors replied after four months. They expressed regret that the friendship existing between the King's Majesty and the Roman Empire had been violated by the enemies of peace, and declared that they did not believe that the Emperor in despatching an army to the regions of the Baltic entertained any designs against the King, but that his object was to crush the attempts of those who were in league with his enemies; and the people of Stralsund, had they shown their obedience to

the Emperor in acts instead of words, might have found a speedier relief against the wrongs of the soldiery from the Emperor's clemency than from external assistance. The Emperor could not well have deserted the King of Poland, who was his friend and cousin; nor was the affair of such moment as to warrant the kindling of fresh disturbances within the Empire, when the conditions of securing peace were not wanting. They therefore begged him to lay down his arms as soon as possible.

The King replied, in a further letter, that it was gratifying to him to learn that they regretted the wrongs inflicted by the disturbers of the peace; it would have been far more gratifying if they had proposed means of protection against them; he had no suspicion of the Emperor in the matter of the irruption of troops into the regions of the Baltic, but having suffered so many bitter injuries at the hands of the disturbers of the peace, he justly held them in suspicion; the people of Stralsund were prepared to state their case before impartial judges, as to which there was the less reason for hesitation since they had learned that their oppression was opposed to the decrees of the Emperor; the friendship and relationship between the Emperor and the King of Poland could not oblige him to submit to or to conceal a hostile attack; in conclusion he stated that he would withdraw his army from the territory of the Empire as soon as he had obtained satisfaction for the injuries inflicted on him.

Peter Baptista Burgus, Commentaries on the Swedish War; Philip Arlanibæus, Swedish Arms; Letter of the King of Sweden to the Electors, pp. 4, 5; Letter of the Electors to the King, p. 36; second Letter of the King to the Electors, p. 49.

SECTION IX.

Of Questions of Duty between Belligerents.

Questions of Duty between Belligerents are questions which relate to the Law of Military Congress, Embassy, Convention, and Treaty.

1. *Whether controversies between princes may be decided by single combat?*

It is admitted that the duel is forbidden by the civil and the canon law. But philosophers and jurists sometimes approve of it and say that it is highly laudable for the purpose of avoiding a greater evil. Strabo records that it was an old custom among the Greeks to decide controversies by single combat, and in Virgil Æneas says that it was right that the quarrel between himself and Turnus should be decided in the same manner. So in Livy Metius says to Tullus, "Let us try a way of deciding, without great bloodshed on each side, which people is to rule the other."

Alciati, on Single Combat; Belli, II, § 15; Gentilis, III, 15; Grotius, II, 23, § 10; III, 20, § 43.

2. *Whether a king in possession of a kingdom may be challenged by one who claims a title to the kingdom?*

When René, Duke of Anjou, sent a bloody glove to Alfonso, King of Sicily, to challenge him to fight a duel for the right to the throne, some thought the conditions unfair because Alfonso had been invested with the crown and was in possession of the Kingdom, whereas René was merely asserting a titular right to the kingly honor. Others, however, considered the challenge lawful, since a crown does not increase dignity, and the possession seized by Alfonso could not weaken the right of ownership which René claimed to belong to himself.

Alciati, on Single Combat, ch. 30.

3. *Whether the general of an army who is challenged by an enemy may honorably decline a duel?*

When the Earl of Hertford, as commander in chief, led an English army into Scotland and was on the point of engaging the Scottish general and army, a herald was sent by the Regent of Scotland to propose terms of peace; and a trumpeter was sent in the name of the Earl of Huntly to announce to the Earl of Hertford that, if the proposed terms of peace did not meet with his approval, the Earl of Huntly was prepared, in

order to avoid the shedding of more Christian blood, to fight a duel with the Earl of Hertford, if he would agree, to settle the present controversy. The Earl of Hertford, however, after scornfully rejecting the terms of peace as being dishonorable, answered the trumpeter, that if the dispute had been between the Earl of Huntly and himself he would not have refused the offered duel, but since the controversy was one between the Kingdom of England and the Kingdom of Scotland it was not in his power to submit the settlement of so great an issue to his personal hazard; still less when he bore the public character of general of the army, did it become him to stoop to a combat with a man of private standing.

In the same way, when the general of the Alban army challenged King Tullus to a duel, Tullus refused on the ground that the quarrel was not between them, but between the states of Rome and Alba; and so the challenge of Sertorius by Metellus and that of Antony by Augustus were refused because it was not expedient that the generals of armies should commit themselves to the hazards of private soldiers.

Hayward, History of Edward VI.

4. *Whether a soldier of inferior rank may challenge a soldier of superior rank to a duel?*

When a common soldier in the army of the King of France appointed a day for meeting an ensign of cuirassiers in arms, the ensign objected that a common soldier was inferior to himself in rank, and therefore he was not bound to take up the challenge. But John James Trivulzio, a man well-versed in military discipline and at that time in command of the troops of King Francis, refused to allow this objection, on the ground that as the common soldier had entered his name on the military roll, and military service is a title to nobility, he was to be regarded as noble. A constitution of the Lombards, however, requires equality between challenger and challenged, and it is expressly provided therein that a count challenged by an inferior may fight "*per optionem*" or by proxy, just as persons of rank were allowed to make their defense by proctors in criminal trials.

Paris of Naples says that if a man is noble for four generations of ancestors, that is, from his great-great-grandfather downwards, he may challenge any one, even a duke. Alciati takes a different view, holding that as there is a definite order among degrees of rank, namely, first "illustrious," secondly "excellent," and thirdly "honorable," so one who belongs to the same degree of rank, although of an inferior quality, may not be repelled by another of the same degree; so that a count may not be refused by a marquis or a duke, because they are all of the same degree, that is to say, "illustrious"; and therefore one who is noble from his great-great-grandfather downwards, and who has passed his

life in arms, should be allowed to meet those who are "honorable," since theirs is the lowest degree and the inequality between them is slight.

Alciati, on Single Combat, ch. 33.

5. *Whether one challenged to a duel in a public war may decline on grounds of private friendship?*

When the Romans were making war on the Campanians on account of their revolt, a Campanian named Badius, a close personal friend of Titus Quintius Crispinus, by whom he had been generously and courteously entertained before the revolt, advanced beyond the outposts and bade Crispinus be summoned. When Crispinus received this message, thinking that Badius was asking for a friendly and intimate conversation, for he cherished the memory of their private relations even in the rupture of public treaties, he advanced a short distance from his companions. As soon as they came in sight of one another, Badius cried, "I challenge you to fight, Crispinus. Let us mount our horses, and in a clear field try which is the better man in war." To this Crispinus replied that neither Badius nor himself wanted enemies on whom to show their prowess, and that even if he were to meet Badius on the field of battle he would avoid him, so as not to stain his hands with the blood of a guest, and so turned and went away. The Campanian then actually began to taunt him more truculently and to cast in the teeth of an innocent man charges of knavery and cowardice more appropriate to Badius himself, calling him a "hospitable" enemy, and one who pretended to spare one for whom he knew he was no match. If Crispinus did not think that the rupture of public treaties had broken off their private relations at the same time, he, Badius the Campanian, then and there, in the presence of all and in the hearing of the two armies, renounced the friendship of Titus Quintius Crispinus and declared that no link bound them together, no tie between a host and an enemy whose country, whose gods of land and home he had come to attack. If Crispinus was a man, let him meet him in combat.

His own troops urged the reluctant Crispinus not to allow the Campanian to taunt him with impunity; and accordingly, merely delaying to ask the generals whether they would allow him to accept the challenge of an enemy in this irregular way, with their permission he took his arms, mounted his horse, and calling Badius by name summoned him forth to fight. The Campanian made no delay; and the combatants charged one another on horseback. Crispinus pierced Badius with his spear above the shield in the left shoulder, and as he fell wounded to the ground, leaped from his horse in order to despatch him on foot where he lay. But Badius before he could be overpowered, escaped to his own side, leaving his shield and horse behind. Crispinus, proudly showing the captured horse and arms and his own bloodstained lance, was conducted to the consuls amid the applause and congratulations of his men, and there highly complimented and rewarded with gifts.

Livy, book 25; Valerius Maximus, book V, ch. 1.

6. *Whether one who comes late to the ground on the day appointed for a duel is to be adjudged to have lost his cause?*

When Charles of Anjou, Count of Provence, and Peter of Aragon were disputing about the kingdom of Naples, it was arranged with the consent of Pope Martin the Fifth that (each accompanied by a hundred horsemen) they should engage in combat on a certain day in the city of Bordeaux, which was then under the King of England. On the appointed day Charles presented himself with his soldiers early in the morning, and waited for the enemy until the fifth hour after noon, when, as he did not appear, Charles rode off together with the umpire, accusing Peter of being a defaulter. Immediately after his departure, Peter came up, and not finding Charles protested that he had run away and that he himself had kept the appointment. On these facts doubt arose as to who had the better cause. On behalf of Charles, it was argued that he had been present at the proper time and had waited for his enemy through far the greater part of the day; on behalf of Peter it was urged that he had come at a convenient time for fighting the battle to an issue, and that his adversary had not waited until sunset with the umpire, as he ought to have done. To settle the dispute another day was appointed by the Roman Pope for the combat, and when Peter refused to come it was adjudged that he had made default, and on that ground he was deprived of the kingdom.

Alciati, on Single Combat, ch. 41; Belli, II, § 5.

7. *Whether enemies may be pursued in the territory of a friend?*

When war was raging between the Romans and Carthaginians, and both were at peace with Syphax, King of Numidia, Scipio arrived with two galleys at a port in the dominions of Syphax, in which were seven galleys of the Carthaginians. Scipio's ships might have been overwhelmed by the Carthaginians before they entered the harbor, but they were carried into harbor by a brisk wind before the Carthaginians could weigh anchor, and Livy says that the Carthaginians did not then dare to attack them in the King's harbor. But according to the Law of Nations an enemy may be attacked wherever he is; thus Euripides says the laws allow an enemy to be injured wheresoever he be found; and the jurist Marcianus says that deserters may be killed wherever they are found, just as if they were enemies. That enemies may not be killed or injured in the territory of others, is not a personal right of their own, but a right of the ruler of the territory; for civil societies have been able to determine that no violence should be done to persons within a territory, except after an appeal to law.

Gentilis, II, 12; Spanish Advocacy, II, 5; Grotius, III, 4, § 8; Belli, II, § 12; Bodin, I, 6, § 68.

8. *Whether a man taken a prisoner on hostile soil may be conducted through the territory of a friend?*

When the Genoese and Milanese were at war, an officer of a Milanese regiment conducted a Genoese nobleman, whom he had taken prisoner in battle within Genoese territory, through the district of Bologna, which is the territory of the Pope, to a Milanese castle. And it appeared that he was entitled to do so because, the prisoner having been lawfully captured in the first instance, the officer might exercise his right over his captive. But the Papal Legate, thinking this action prejudicial to his master, consulted the celebrated jurist, John of Imola, who gave it as his opinion that it was certainly not lawful to lead a prisoner through Bolognese territory without leave being obtained; and further that any one who had done so was liable to an action for wrong, and was bound to deliver up his prisoner to the Legate, if asked. This view was approved by Pierino Belli on the ground that a prisoner taken elsewhere, but not yet conducted within guards, ought not to be detained or subjected to restraint in the territory of another.

John of Imola, Opinions, 50; Belli, II, § 12.

9. *Whether foreigners found on hostile soil may be molested?*

When the Corcyraeans were about to lay siege to Epidamnus, they first gave foreigners an opportunity of departing, announcing that otherwise they would be treated as enemies. The formula in Livy is this, "Let him be an enemy, and they that are within his guards." The reason is that injury may be feared from such persons. This is the rule in regular war, but not in reprisals to which foreigners are not subject, unless they share in public burdens and services; and it only applies to those foreigners who came before the war and, on its breaking out and being known, remain within the territories of the enemy, not to those who are conveyed thither after war has begun but before it is known.

Grotius, III, 4, § 6.

10. *Whether victory is to be determined by remaining on the field of battle?*

When the Argives and Spartans were contending for the territory of Thyrea, the Amphictyons decided that the matter should be settled by a fight between picked men from each side. The Spartans on their side put in command Othryadas, the Argives Thersander. After the battle, two of the Argives survived, Alcanor and Chromius, who brought back news of victory to their countrymen; and after they had gone Othryadas, who had been wounded, collected the shields of the dead Argives and erected a trophy, which he consecrated to Jupiter with his own blood. The quarrel was renewed on the question of the victory, and the Amphictyons were again constituted the judges. At the trial the

Argives contended that the victory was theirs in virtue of their having the larger number of survivors; the Spartans claimed it because, when the others of the opposite side had betaken themselves home, the single surviving Spartan remained on the field of battle and collected the spoils; and judgment was given for the Spartans.

Gentilis and Grotius, however, are of opinion that although those who keep the field of battle are presumed to be the victors, yet if it was not shown that the Argives had withdrawn from fear, they should certainly not have been regarded as beaten, especially as they went away at nightfall, thinking themselves victors and intending to carry the news to their countrymen.

Plutarch, Lives; Gentilis, III, 15; Grotius, III, 20, § 45.

11. Whether victory is to be determined according to the rank of those who are slain or captured, or according to their number?

Philip, King of Macedon, and Attalus, King of Pergamus, met in a naval battle, in which it befell that one of Philip's ships took the royal ship of Attalus, which had been abandoned by its crew, and brought it into anchorage not far from the scene of battle, whereupon Philip claimed the victory as his own. But, as Polybius says, he rather acted as victor than felt himself to be such, because he had lost many thousands of his own men and incomparably more ships, whereas on the side of Attalus very few ships were lost and not more than a hundred men perished. This opinion of Polybius both Gentilis and Grotius approve.

Polybius, book XVI; Gentilis, III, 15; Grotius, III, 20, § 45.

12. Whether those who yield to new forces coming up are to be regarded as defeated?

After a naval battle which, according to Thucydides, was the greatest ever fought by Greeks with Greeks, victory was claimed by both sides. The Corinthians set up trophies because they had had the better of the Corcyræans in the battle until nightfall, had sunk about seventy ships, taken not less than a thousand prisoners, and recovered more wrecks and bodies; and the Corcyræans also set up a trophy because they had destroyed about thirty ships of the Corinthians, and the others retreated when the Athenians came up and declined a fight, thus giving the Corcyræans an opportunity of collecting their wrecks and bodies. And so, he says, both sides argued that they were victorious; but the Corcyræans, according to Grotius' opinion, had no ground for doing so, since the Corinthians had had the better of the battle with them and yielded not to the Corcyræans, but to the Athenians.

Thucydides, book I; Grotius, III, 20, § 45.

13. *Whether a prize appointed to the one of two combatants who slays the other is due to one who puts the other to flight?*

When Paris and Menelaus were about to fight for the possession of Helen, they made a bargain in which one of them proposed that Helen and all her goods should be given up to the one who should overcome the other, and the other agreed that the one who should slay the other should win Helen and her goods. The combat began and Paris betook himself to headlong flight. In Plutarch's *Symposiaca*, the question is discussed whether Menelaus was entitled to Helen. And some thought he was, because the condition first offered was "if the one should overcome the other," which Menelaus, who had put Paris to flight, undoubtedly did; and although the subsequent reply was, "if the one should slay the other," it was inoperative, because a condition offered by one could not be changed by the other.

Others were of opinion that the words of the latter condition were declaratory of the former, because it might have been uncertain when one overcame the other, but there could be no uncertainty if the other was slain. Consequently, that condition not having been fulfilled, Menelaus was not entitled to Helen. And Plutarch says the matter was so concluded, because, as judges, when one part of a law is repugnant to another, adopt so much of it as admits of no dispute, and reject what is obscure, so here an agreement is rather to be understood which expresses an easily ascertainable issue of the combat and admits of no objection being raised.

Gentilis, however, says that Paris ought to have failed in his case and lost Helen, because it was his flight that made it impossible for any other issue to be put to the combat; for the interpreters of the law tell us that if one promises another to give him something if he beats him in a race, and then refuses to run himself, he is none the less bound to give the thing.

Plutarch, Symposiaca; Gentilis, III, 15.

14. *Whether if a reward is offered to him who first scales the walls of a city, and two scale them at the same time, a reward is due to each?*

When New Carthage in Spain was taken, and Publius Scipio wished to reward the valor of the soldiers who had scaled the walls, he publicly proclaimed that the preëminent honor of a mural crown should belong to him who had first scaled the walls. Two men claimed to have done so, nor could it be determined which of them was first, because they had made their ascent together. Livy records that Scipio presented both with mural crowns on account of their valor.

The jurist Ulpian, however, says that if a legacy is left to the man who shall first climb the Capitol, and two are said to have arrived at the same time, and it does not appear which arrived first, neither of them

can claim the legacy; and Hugo Donellus, in his commentary on this discussion of Ulpian, says that Scipio acted as he did more by way of grace than of legal obligation, and that Scipio knew this well enough when he privately declared that he had not given the prize to both because he was bound to do so, but because he judged it expedient to ignore the point under the circumstances; in short, as Livy says, he did it to check a mutiny to which the enthusiasm of factions among the troops seemed likely to lead, if he had preferred one to the other or given the prize to neither. Grotius records that Chrysippus once discussed this question, whether a prize offered to him who first reaches the goal is due to both or neither, if two men reach it at the same time. The word "first" is ambiguous, for it means either the man who precedes all, or the man whom no one precedes. But because prizes are matters of favorable interpretation, the better opinion is that they should share the prize; although not only Scipio, but both Cæsar and Julian more generously awarded full prizes to men who scaled walls together.

Livy, book XXVI; Digest, XXXIV, 5, 10; Donellus, on this passage; Grotius, II, 16, § 19.

15. *Whether a herald passing through to foreign countries
is bound to obtain leave?*

Ferdinand Gonzaga ordered a herald of Francis the First, King of France, who had been sent into Germany, to be put in custody, and by an edict of the Imperial Council this same person was bidden to quit the borders of Germany, and a proclamation was made forbidding any other person of the same condition thereafter to set foot within the confines of the Empire, without first obtaining leave. As to this incident Paschal says:

"Where, I ask, has any man read or heard that a herald must obtain leave or a safe-conduct? His very office is himself to obtain these favors for others, and he has the peculiar right of penetrating where it is either unlawful or unsafe for ambassadors to go. So the King of the Argives seems to have thought in Æschylus, when he expresses surprise that the Danaids had dared to set foot in his realm, without first sending a herald."

Paschal, chs. 3 and 22.

6. *Whether there is a right of embassy with those who are
not regular enemies?*

The Emperor Theodosius threw into prison the ambassador of a certain tyrant who had rebelled against himself; and Cicero censured the admission of an ambassador from Antony, to whom the gates of the city ought not to have been open, and proposed that he should not be allowed to return to Antony. Alexander, however, as Curtius relates,

when he besieged twenty thousand robbers, and the barbarians sent ambassadors to him, ordered them to be admitted at once; and Cæsar, in the third book of the Civil War, expressly says that deserters and brigands in the valleys of the Pyrenees were allowed to send ambassadors. But the general opinion is that the right of embassy belongs only to regular enemies, and that ambassadors from others are sometimes admitted, not out of regard for them, but for the sake of the general advantage, since otherwise all means of reconciliation would be cut off; and if word has been pledged to such ambassadors, it is quite clear that it may not be broken.

Ayrault, Judgments, on Embassies, ch. 23; Gentilis, on Embassies, II, 3; Grotius, II, 18, § 2.

*[Whether the ambassadors of enemies should be admitted
into camps and besieged places?]**

The ambassadors of the Bœotians, who were enemies of the Romans, were not admitted into the camp by Titus Quintius; and Constantius excluded from the camp the ambassadors of Magnentius. And the same rule is observed in besieged places; thus the Goths, who were holding Urbino with a garrison, bade the ambassadors of Belisarius begone from the place with all speed. This rule is eminently reasonable; since men who are in a camp or a besieged place have less confidence in their own strength.

Those, however, who do not doubt that they are far stronger than the enemy, have less dread of admitting the enemy's ambassadors even into a camp. Thus Alexander led twenty ambassadors of the Scythians on horseback through his camp, admitted them to his tent, and bade them be seated; and the Roman consuls at Utica similarly admitted an embassy of the Carthaginians. Each consul sat on a raised throne, the generals, tribunes, and columns of legionaries standing by on either side, everywhere gleaming eagles and standards fixed, in order to impress the ambassadors with the formidable number of the troops; then at a word from the consuls the trumpet proclaimed silence and a herald cried, "Approach the Carthaginian Ambassadors"; and they, passing through ranks of armed men to the place of the Tribunal, were bidden by the consul to declare what they had come to seek.

So, too, in the year 1576 Rosenberg, a Bohemian knight, ambassador from the Emperor Maximilian to the Poles, was admitted and led through the midst of the camp and between serried troops of horsemen to the spot where the Senate sat in full assembly; whence he learned how ridiculously false was the story, of which certain persons had convinced the Emperor, that Stephen Bathory had been elected king by a faction in the kingdom which might easily be despised.

* This *quaestio* is to be omitted. See Vol. I, Errata. The topic is treated *supra*, p. 49.

17. *Whether an ambassador passing through on his way to an enemy may be intercepted?*

When Fregoso and Rincon, ambassadors of Francis, King of France, who were secretly traveling through Italy to the Turk, were captured and put to death, the King of France complained of a grave injury committed against the Law of Nations. But Thucydides relates that ambassadors of the King of Persia to the Spartans were intercepted by the Athenians; and the Romans intercepted ambassadors of the Carthaginians on their way to the King of Macedonia. This is undoubtedly lawful if there is a reasonable suspicion that they are plotting against those through whose territory they pass; but if it is clear that they have been sent on other and distinct business, it is less lawful to hinder them. And so Alexander the Great, after the capture of Tyre, sent away the ambassadors of the Spartans unhurt, as Curtius relates, because they were there to celebrate an annual religious festival.

Bodin, V, last chapter; Bosold, on Embassies, ch. 5, § 15.

18. *Whether a safe-conduct granted to one making a journey extends to one making ready for a journey?*

Juan de Figueroa, general of the army of Philip, King of Spain, granted a safe-conduct to the Marquis of Messara (who was of the French party) to go from his own castle to Venice. Afterwards the same general invaded the lands of the said Marquis, took him prisoner, and demanded the price of ransom from him. His excuse was that the safe-conduct had been given for him to make a journey in safety, not for him to stay at home in safety; and he had been taken in a place where he might have assisted the enemy by his counsel and influence. For the Marquis it was urged that he was making ready for the journey when he was taken, and ought to be regarded as actually making it, because no one could have suspected that for one to whom a greater thing had been granted, namely to pass through the territory of the King of Spain, a less thing, namely to remain at his own home while making ready for the journey, would be fraught with danger. Pierino Belli says that, as one of the judges, he left the dispute undecided, and he leaves the decision to the reader.

Belli, IX, § 15.

19. *Whether when a safe-conduct is given for going, it should be held to be granted for returning also?*

Bartolus, Angelus, and other doctors say that a safe-conduct given for going is deemed to be also given for returning, because a man is not said to have come to a place in security, who is not allowed to withdraw in safety; and because the time of coming, remaining, and returning is regarded as the same. Alexander, however, Geminian, and others hold the contrary, because the Emperors Constantine and Julian decreed

in express words that ship-masters should enjoy security "coming and going." Pierino Belli thinks that the answer may depend on circumstances, and on the intention of the grantor of the safe-conduct. For if the general of a war were to grant an enemy a safe-conduct to come within his guards and to stay there three days, it would be absurd if, after the lapse of three days, he were not to allow him to depart in safety. But if he were to grant him safe-conduct to go to Rome, or to go into France, the act is exhausted by the mere going, and the words should not be departed from.

Belli, IX, § 21; and authorities by him cited.

20. *Whether a safe-conduct for going is to be restricted to the first act of going alone?*

The jurists are agreed that a safe-conduct is restricted to the first act and that a repetition is not permitted, with the proviso, however, that if the request was simple and indeterminate, and the grant was determinate and named one or more times, the safe-conduct must be understood according to the determinate grant; and if the request was determinate, and the safe-conduct granted simply and indeterminately, the terms of the request must prevail. If, however, the request was simple and indeterminate, and the safe-conduct similarly granted in simple and indeterminate form, it must be understood to mean once only, and that the first time. Unless, indeed, the reason of the request requires a different construction; as if it was requested and granted for the purpose of treating of peace; for in that case the safe-conduct should be allowed an indefinite number of times, as long as the negotiations for peace continue.

Bartolus on Digest, XLVIII, 4, 1; Belli, IX, § 24; and authorities by him cited.

Whether one to whom a safe-conduct for going has been given may send another in his place?

When a safe-conduct was given to a certain Marcellus to come to the city of Asti with ten horses and other things, he sent his wife in his own stead, and on this account the horses and other things were intercepted. Baldus maintains that he had a right to send his wife, because of the unity existing between spouses, and that the horses and other things ought to have been restored, because they were included expressly in the letters of safe-conduct. Grotius, however, holds the following opinion on this and the preceding questions: One who is allowed to depart is not necessarily allowed to return; and one who has leave to come himself, can not send another; for these are different things, and reason does not compel us to wander from the words. Moreover, one who is allowed to come may come once, and not more than once, unless some addition to the words makes another meaning probable.

Belli, IX, § 13; and authorities there cited; Grotius, III, 20, § 16; Gentilis, II, 14.

21. Whether a safe-conduct given during peace may be violated on war breaking out?

When by reason of a truce there was peace between the Emperor and the King of the French, a certain German named Savorgnan, a soldier of the King of France and a man of gentle birth, obtained from Francis d'Este, the representative of Ferdinand Gonzaga, the Imperial general, a safe-conduct to betake himself to Acqui in Liguria, to recover his health. He had hardly arrived there when the French attacked two garrisons of the Imperialists and the war suddenly burst into flame. Thereupon the German, distrusting his safe-conduct, started to return home and was detained at Asti by Francis d'Este, the commander of the garrison. The reasons alleged were that the grant of a safe-conduct was to be understood to hold good while things remained in the state they then were, whereas now things had been altogether changed by the conduct and fault of the troops of the King of France. The interests of the Emperor also required his detention because he had surveyed the garrison at Asti and observed the weak points in its fortifications. Pierino Belli, however, advised the generals, Ferdinand and Francis, that it was not right to obscure the Emperor's promise by quibbles, nor to destroy its meaning by arguments; that brought no honor to one who had both given the promise and had power either to detain or release the prisoner; by which means he procured the release of the German, but not until some time afterwards, on account of the weakness of the camp and garrison of Asti.

Belli, IX, § 30.

22. Whether one who is released on condition of returning if another is not given up in his place is bound if the other dies in the interval?

Guicciardini and Giovio relate that a certain Baglione, who had been taken prisoner, was released on the condition that he would return, if another, whom we may call Titius, were not given up in his place. Baglione conducted Titius towards the enemy as far as he could venture without a herald, and there, while he was waiting for a herald from the general who had released him, and to whom Titius was to be given up, a subordinate general decided that the exchange was void; and in the meantime Titius died. In this case Gentilis says that there is nothing to be said against Baglione, since it is a rule that whenever one who is interested in the fulfilment of a condition does nothing to prevent its fulfilment the case is as though it had been fulfilled. Grotius, however, holds that an act of a third party gratuitously promised is sufficiently fulfilled if nothing is omitted on the part of the promisor; but that in onerous promises one is bound to give an equivalent. Hence in the question raised, the person released is not bound to give himself up into

custody, for the presumption in favor of liberty does not allow us to give that meaning to the agreement; but he ought to render the value of that thing which itself he can not render.

Gentilis, II, 15; Grotius, III, 21, § 30.

23. *Whether the period of a truce is to be reckoned from the moment or from the day?*

A truce of five years was made between Philip, King of the Spains, and Henry, King of the French, on the further side of the mountains, on the fifth day of February, in the year 1555, providing that from that day the war should be suspended. On the same day the Sieur de Brisac, general of the French army on the nearer side of the mountains, stormed a Spanish fortress called Vignale; and the question was raised whether the fortress might be retained by the French, as having been captured during the existence of the war; or whether it ought to be restored, on the ground that it was captured while the war was suspended by the truce? The reason for thinking that it might be retained was that the war was suspended "from that day," that is, "after the conclusion of the day." On the other hand, the reason for thinking that it ought to be restored was that the words "from that day" may bear the meaning (as the jurists maintain) of "from the commencement of that day," so that the whole day would be included; and where there is a presumption in its favor (as there is in favor of the effects of a truce, namely, the cessation of hostilities and the retention of possession) this wider interpretation should be admitted.

Pierino Belli held that time should be reckoned from the moment, because it is as unfair that hostilities should continue when a truce has been completed as it is absurd that the ordinary operations of war should be forbidden before a truce is concluded. Grotius lays down the following rule as to the time at which a truce terminates. The duration of a truce is usually prescribed either as a continuous period, as "for a hundred days," or with a fixed terminal point, as "till the first of March." In the former case the reckoning should be made to minutes; for that is the natural way, whereas the reckoning made according to civil days is derived from the laws or customs of peoples. In the second case there is usually a doubt whether the day or month to which the truce is to last is meant to be included or not; and it appears that it should be included; as if one were to say that something should be done "within the day of his death," the actual day on which he dies is reckoned in. Thus Spurina had predicted for Cæsar a danger which should not extend beyond the Ides of March, and when he was reminded on the actual Ides, he said that the Ides had come, but not gone; and this interpretation, he says, should even more certainly be adopted when the extension of the time is in itself favored, as in a truce which means the saving of human life.

Belli, V, § 16; Grotius, III, 21, § 4; Gentilis, II, 12.

24. *Whether one who by reason of necessity is found on hostile soil after the time prescribed for a truce is subject to the evils of war?*

An agreement of truce contained a provision that any enemy who was with us should leave the harbor before the 15th of March. One of them was prevented from sailing by ill health or a storm, or was carried back into harbor by the wind; later, when the 15th of March was past, he wished to leave. The question is whether he can claim the benefit of the truce. Bartolus gave it as his opinion that the terms being as stated, an enemy found within the harbor might be put to death with impunity, and no regard need be paid to the manner of his detention beyond the stated time.

Besold rejects so inhuman an opinion as repugnant to natural equity and opposed to the tenor of the law, and argues that the protection of the truce should be extended to him and that an unforeseen misfortune should not prejudice him. He adds this proviso, however, that he must not have put himself into a position where the happening of the misfortune was inevitable.

Grotius, however, agrees with Bartolus and says that the case here put raises strictly no question of a penalty, but of a right which lapsed at a definite time; hence the man seems to be in the same position as one who, having come in time of peace, and war suddenly breaking out, is unlucky enough to be apprehended among the enemy. However, he adds, there is no doubt that it is more humane and generous to release such a man.

Bartolus, on Digest, XXXIX, 4, 15; Besold, on the Law of Peace, ch. 6, § 5; Gentilis, II, 13; Grotius, III, 21, § 9.

25. *Whether the violation of a truce may be punished within the period of the truce?*

When the Carthaginians during a time of truce attacked a Roman fleet which had been scattered in a gale, and during the same truce fortune delivered some ambassadors of the Carthaginians into the hands of Africanus the Elder, he, after declaring that they had violated not only the truce but the Law of Nations as well, said that he would nevertheless do nothing unworthy of the traditions of the Roman people or of his own character. And indeed some jurists say that the violation of a truce on one side does not justify its violation by the other side, but that it is sufficient that punishment may justly be inflicted when the truce has expired.

Others, however, lay down a different rule especially in truces of long duration and in places which on account of their neighborhood are convenient for offensive operations, on the principle that one who breaks treaties and oaths should not be in a better position than one who honorably observes them. They attribute the conduct of Africanus to generosity rather than to justice.

Belli, V, § 1; and authorities by him cited.

26. Whether women taken prisoners should be ransomed?

When the Spaniards asked that women who had been taken prisoners by the Italians should be restored to them without ransom, the Italians refused. The Spaniards' request was supported by considerations of humanity and by the ancient custom of treating the weaker sex as exempt from all hardship; and the Italians' refusal by a recent Roman disaster, in which they ransomed girls and even infants from the Spaniards by a fine of gold.

Gentilis says that right was on the side of the Italians, who were justified in returning the example of injustice set them by the Spaniards. The King of the French, however, provided a noble solution, which at once confirmed the justice of the Italians' action and maintained what we call the right of women; for the King gave the money to the Italians and generously restored the women to the Spaniards.

Gentilis, II, 2 and 21.

27. Whether those taken prisoners in a pitched battle should be ransomed at a higher price than those taken on other occasions in war?

In the Neapolitan war between Ferdinand, King of Spain, and Louis the Twelfth, King of France, Mariana relates that the French prisoners taken at Ruvo were the subject of a dispute carried on with much warmth on both sides. It had been agreed between the armies that a captured horseman should, after being deprived of his horse and arms, be allowed to buy his liberty by the payment of a quarter of his annual pay. The French had a few days before captured Theodoro Bocalo (a general of Albanian cavalry), Diego Vera (who was in command of the artillery), and Escalada (captain of a company of Spanish infantry), and about thirty others. They released the others on the terms and price agreed, but detained these three on the plea that they were officers and as such ought not to be included in the general rule, and that those of higher rank ought to be excepted from conditions applying to the ordinary man. Now, however, as if forgetting their own action, they demanded that the French taken at Ruvo should be released at the agreed price, without regard to the fact that many of them were officers of high rank and in command of troops. Further, Gonsalvo, the Spanish general, was informed that the rule of the Neapolitan war, that a horseman should be ransomed for a quarter of his year's pay, did not extend to prisoners taken in a pitched battle or at the capture of a town. The veterans and the elder nobles of the province were consulted and replied that this was the rule observed by the custom of the province. But whether this opinion was given to please, says the author, must not be inquired too closely. At any rate in accordance with this opinion a reply was given to the French that the prisoners must bargain about the price of liberty with those in whose hands they were, and must not claim the benefit of

the common privilege of the others. The motive of this decision, he thinks, was not the profit of a few persons, but by this pretext to prevent good soldiers from taking part in a battle which, as matters then stood, seemed likely to take place shortly with decisive result.

Mariana, History of Spanish Affairs, book 27, ch. 18.

28. *Whether a private soldier is bound to fulfil a promise made to an enemy on account of his ransom?*

The Lusitanians having taken three prisoners released one of them on condition that he should bring money for the three and that, if he failed to return, the other two should pay for him as well. The man refused to return and accordingly the other two paid the money for all three. The jurist Servius advised that it was equitable that the prætor should grant an action against him; because, says Gentilis, he was under an obligation to return, for, if he were not under an obligation, the *negotiorum gestio* or unauthorized agency would have been of no service to him. There is, however, a great conflict of authorities on the question whether a private soldier who is released on a promise to pay a ransom or else to return to the enemy is bound to keep this agreement.

For Bartolus, Baldus, Angelus, and others say that the agreement need not be kept; and their opinion is supported vigorously and at some length by Zazius in his controversy with Eckius. The contrary opinion is held by Decius, Alciati, Duaren, Covarruvias, Garsias, Hotman, and Bodin, the last of whom says that the dictum of Bartolus is too trivial to be worth confuting; and custom, too, supports this contrary view, as Fulgosius testifies. Regulus is held to deserve the highest praise for keeping his word in such a case; and the Romans sent back to Hannibal a soldier who attempted to break his word so given.

Covarruvias and Garsias, however, allow that a promise which contravenes public or military law, should not be kept; among which promises Gentilis places a promise not to serve one's prince or country. For although a man keeps a promise to return to the enemy, and thereby deprives his prince or country of his services, yet this promise is good, his capture having already deprived them of his services. For we may concede even against public interest that a thing should not exist; but that it should exist without performing its proper function can not be conceded, for that is against nature.

Grotius agrees with Gentilis against Bartolus, and wonders that there should have been found masters of law to teach that public agreements made with enemies bind honor, whilst those made by private persons do not. For since private persons have private rights which they can bind, and enemies are capable of acquiring rights, what can there be to prevent an obligation arising? But how far the power of private persons to make agreements extends is, he says, a more difficult question;

and as regards an agreement not to serve against one in whose power a man is, although others pronounce such an agreement void on the ground that it is contrary to the duty which a man owes his country, he came to a different conclusion. For everything that is contrary to duty is not necessarily void, and moreover it is not indeed contrary to duty to win your liberty by promising something which is already in the enemy's power. For the cause of the country, he says, is in no way injured, since one who has been taken prisoner, unless liberated, should be regarded as already lost to it.

Digest, III, 5, 21, pr.; Gentilis, II, 11; Hotman, Famous Questions, 7; Grotius, III, 22, §§ 1, 5, 8.

29. *Whether terms of surrender granted by a general must be adhered to by the supreme authority?*

When Maharbal had pledged his word to certain Romans who had escaped from the battle of Lake Trasimene, not only to preserve their lives, but, if they would hand over their arms, to allow them to depart each with a single garment, Hannibal, who was some distance away at the time, afterwards detained them on the pretext that it was not in Maharbal's power, without consulting him, to pledge his word to persons who surrendered that he would keep them whole or uninjured. On which Livy expresses his verdict by saying that Hannibal acted in this with Carthaginian faith and piety. But when Sophonisba, who had been taken prisoner in war, had received her freedom from the general Masinissa, Scipio held that the Roman Senate and People could alone decide such a matter, and therefore that Masinissa, who was general when Sophonisba was captured, had no power to give her her freedom.

Grotius makes this distinction: Persons or lands actually captured in war, it is not within the competence of generals to give up; but of things not yet captured it is undoubtedly within their competence to dispose, because towns and men often surrender on condition of their lives being spared, or of retaining their liberty and property, matters on which circumstances do not, as a rule, allow the decision of the supreme authority to be asked.

Grotius, III, 22, § 9, and notes to that passage; Camden, Elizabeth, 1594.

30. *Whether those who surrender too late should be accepted?*

When the Ionians heard that the Lydians had been conquered by the Persians, they sent ambassadors to Cyrus begging him to receive them on the same terms as those on which he had accepted the surrender of the subjects of Cræsus. Cyrus, however, returned them the following answer: A certain piper, having espied some fish in the sea, began to pipe to them, thinking the sweetness of the music would attract them to

land; but being disappointed of his hope, he cast a net into the sea, and inclosed a great draught of fishes and drew them to land. And when he saw them jumping about, he said, "Cease your dancing now, I beg, since you would not come out and dance when I piped."

Cyrus gave this answer, says Herodotus, because the Ionians formerly, when he urged them by ambassadors to revolt from Cræsus, obstinately refused, and then, when events did not turn out as they expected, they were ready to submit to him. In the same spirit the Duke of Alba censured Prospero Colonna for having accepted the surrender of a fortress in which a breach had already been made by artillery, because he thought its defenders did not deserve to have their lives or property spared. But Scipio, when the scaling-ladders had been already set against the walls of a Spanish city, granted the petition of the townsfolk, by the mouth of a herald, to be allowed to depart in peace, and ordered the retreat to be sounded; and when it was not heard or obeyed and the town was stormed, he repaired the deed and even punished his own men. And Cicero says that those who lay down their arms and throw themselves on a general's honor should be received, even though the ram has already pierced the wall.

Herodotus, book I; Gentilis, II, 17.

31. *Whether one who has agreed to allow liberty to soldiers may detain the general?*

Natalis Comes tells of a general who agreed that a garrison might depart, and then detained the commander; an absurd quibble, says Gentilis, because, as the father of a family is included in the word "family," so the commander is included in the garrison, and under the word "garrison."

Gentilis, II, 14; Grotius, III, 21, § 5.

32. *Whether one who has agreed to allow an army to depart may detain his own subjects who are serving therein?*

After agreeing that the French army might depart from the Kingdom of Naples, the Spaniards said that the agreement must not be understood to apply to Neapolitans who were in the French army; and, according to Gentilis, they were justified; because, although they could not have come to a more harsh decision, the title to that kingdom being a subject of the keenest controversy, still they were entitled to detain those whom they considered their own subjects; and the French ought to have made express mention of the Neapolitans in the agreement, because mere adherents are not included in an agreement unless they are expressly referred to.

Guicciardini, book VI; Gentilis, II, 18.

33. *Whether the lives of those who surrender to the honor and mercy of a victor should be spared?*

The city of the Falisci, which had several times rebelled and had always been defeated in battle, was at last compelled to surrender to the consul Quintus Lutatius. The Roman people desired to wreak their vengeance on it, but being informed by Papirius, whose hand, by the order of the consul, had written the terms of surrender, that the Falisci had committed themselves not to the "power" but to the "honor" of the Romans, they calmly laid aside all anger, and resisted the promptings of a hatred not wont to be easily overcome, in order, as Valerius Maximus says, not to fail in justice.

And again, as Diodorus Siculus records, when the Syracusans debated, after the defeat of the Athenian army, what should be done with the prisoners, and the others all to a man advised that they should be put to death, a certain old man named Nicolaus, arguing in favor of showing mercy towards them, said: "They have surrendered with their arms, trusting to the mercy of the victor; wherefore it were shame that their hope of our humanity should be disappointed." And later: "What Greek ever thought that those who have committed themselves to a victor's mercy should receive a punishment from which there is no appeal?" Nevertheless, when Phaneas, the ambassador of the Ætolians (who had surrendered themselves and their possessions to the honor of the Roman People), answered the demand of Manius the Roman consul that certain instigators of the war should be surrendered to him without delay, by saying that they had given themselves up not to the slavery but to the honor of the Romans, and that the consul's demand was contrary to the custom of the Greeks, the consul flung back that he cared nothing for the Greek custom and that by Roman custom he had full authority to treat those who surrendered at his own discretion, and he ordered the ambassadors to be put in chains.

The view that the lives of those who surrender should be spared is supported by the ruling of the jurist Baldus, who says that if to-day a state should surrender itself to another after the manner of an ancient surrender for the victor to do with it as he would, yet he ought not to take life; and others maintain that if one commits himself to the "good grace" of another, his person may not be injured; for by his so committing himself, it is deemed to be impliedly agreed that grace shall be shown; and it is the same thing if one submits himself to the "will" of another.

Referring to these questions, Pierino Belli says that they are of the first importance in warfare, because of those persons who, when they are unable to defend any longer a garrison intrusted to them, surrender at discretion, when sometimes some are crucified and others sent to the galleys; which, he says, ought not to be; for "discretion" imports the

judgment of a good man. Gentilis, who discusses at length the interpretation of such words in the usual forms of surrender, in every case concludes that they ought at least to extend to the mere protection of life. He adds the warning, however, that he is not speaking of subjects, for these, even though they surrender at discretion, seem to make a far more complete submission.

Grotius infers from the words of the consul Manius (although he released the Ætolian ambassadors) how freely and without violating the Law of Nations one to whose honor a people have intrusted themselves may act; and he maintains that these words imply nothing more than mere surrender and that the word "honor" in such a context means no more than the mere integrity of the victor to whom the vanquished commits himself. He goes on to say that in his judgment it makes no difference whether in surrendering a man says that he surrenders himself to the other's "wisdom," or "moderation," or "mercy"; for all these words are merely compliments. In support of this opinion he quotes Polybius as saying that the Romans count it the same thing for a man to commit himself to the honor of another, and for him to give the victor absolute power to decide his fate. But with regard to the duty of him to whom the surrender is made, he cites the words of Seneca: "Mercy has absolute discretion; it judges not under a legal formula, but on principles of equity and fairness; and it may acquit the accused or assess the damages at will."

Valerius Maximus, VI, ch. 5; Belli, II, § 5 at the end; Gentilis, II, 17; Grotius, III, 20, § 50 and notes to that passage.

34. *Whether those who surrender after bargaining for their lives or safety may be made slaves or detained as prisoners?*

The Emperor Charles the Fifth threw into prison a Landgrave who had come to him after receiving a promise of safety; and Giovio relates that the Turk, without breaking his word, made slaves of men who had bargained for their safety. These actions appear not to have been justified, because those who are not at liberty to return home are very much in the position of slaves, and slavery is in law death, or the equivalent of death.

Gentilis says that one who has only bargained for his life may be made a slave, for it is a subtlety of the Civil Law which makes slavery equivalent to death; and much more may he be treated as a prisoner who is not a slave; and this is what Giovio says that Gonzaga did. But he does not approve of the conduct of the Turk in making slaves of those who had bargained for safety, because he holds that this word implies something more than the word "life"; and further he says that the action of Charles the Fifth in imprisoning one to whom a promise of safety had been given is also to be censured.

Gentilis, II, 17; Giovio, book 37.

35. *Whether women who were allowed to carry with them whatever they could might carry out their husbands?*

When Roger, King of Sicily, and the Roman Pope had persuaded Guelph of Bavaria to stir up war against the Emperor Conrad the Third, Henry, the Emperor's son, engaged him in battle. This Henry was born in the town of Waiblingen, the name of which he enjoyed as a family name, in memory of his birth, and in his army "Ghibelline" was the battle-cry, while on the other side it was "Guelph." In this war the victorious Emperor, after the capture of a certain town, determined to deal severely with the men, but gave leave to the women to depart, granting each of them the right to so much of her own things as she could carry out on her shoulders. But burning love gave cunning to their wits and strength to their weakness; and they carried out their husbands. Instead of being incensed at being tricked and outwitted by this splendid deceit, the Emperor, victorious as he was, allowed the vanquished general to lay down his arms and received him into favor. The names, however, remained, and the practice of calling the Papal party "Guelphs," and the Imperial party "Ghibellines" continued from that time onwards. Paulus Æmilius gives this account of the women's deed. Gentilis says it was a "pious fraud"; for things which are animals are said to be "led" or "brought," not "carried," a word which should not be given a ridiculous or artificial meaning.

Paulus Aemilius, book VII; Gentilis, II, 17.

36. *Whether those who have bargained to leave with clothes may leave with arms?*

The Coroneans made war on the Chians who had wrested Leuconia from them; and when the Chians were utterly unable to resist their strength they surrendered on these conditions, that they should be permitted to leave the city each with a cloak and a single garment. On hearing these terms, the Chian women bitterly reproached their husbands for having resolved to leave their arms and intrust themselves naked to an armed enemy; and when they replied that they were bound by their oath and had no further choice in the matter, the women insisted that the arms must on no account be left behind, especially as they could quite well satisfy the pledge they had given by telling the enemy that a brave man's spear was his shirt, and a shield his cloak. The men agreed to take this counsel, and on the day appointed for the departure suddenly marched forth into the midst of the enemy fully armed. Terrified at their audacity and seeing them well equipped and ready for anything, the enemy did not dare to obstruct their march, nor to advance against them, thinking themselves well out of the affair if the foe would depart leaving everything else.

Hegesippus quotes the saying of a Roman soldier, "Arms are a burden to others, to us they are a covering"; and when the gates were betrayed to the Sabines by the maid Tarpeia, daughter of the commandant of the Capitol, who had asked as the price of her treachery for what they wore on their left hands, which might be either shields or bracelets, the Sabines, in order to keep their word and at the same time to punish her, crushed her beneath their shields.

Gentilis, however, shows that in law clothes mean one thing and arms another; that in agreements of this kind arms are usually distinguished from clothes, and that the practice of ordinary speech and common sense should be observed.

Plutarch, Famous Women; Gentilis, II, 17.

37. Whether a license granted to persons extends to their goods?

A safe-conduct was given to a Castilian who gave up a fortress to depart in safety with his allies and with his goods. The question was raised whether the allies too might take their goods. Florian, who was consulted by the Duke of Carmagnola, gave it as his opinion that the safe-conduct did not extend to the goods of the allies because of the possessive pronoun "his," which imports ownership. This opinion is not approved by Gentilis, who asks whether the allies must go naked, and why, if the license given to the Castilian covered the Castilian's goods, that given to the allies should not also cover the allies' goods. And therefore it appears to him that the words "with his goods" must be taken in the sense of "each with his goods."

Belli, IX, § 24; Gentilis, II, 14.

38. Whether the surrender of some inures for the benefit of the rest?

When a certain city was besieged by Alexander, some of the inhabitants made surrender and opened the gates of the city to Alexander. Curtius says that Alexander spared the others as well, even the authors of the war, against whom by the Law of War he might justly have been incensed. And when, as Giovio relates, the people of Cortona were besieged by Vasto, a commander of the King of Spain, they surrendered even against the will of the commander of the garrison, the terms of the surrender, he says, excluding the garrison; yet Vasto released them, though deprived of their arms, on grounds of humanity, since they appeared to have made light of the strength of a powerful army.

Gentilis says that if, as often happens, there has been a general discussion and the besieged disagree as to the surrender of the town or as to the terms of surrender, a surrender made by the majority should be held to be made by all and should inure to the benefit of all, even of those who spoke and acted against the proposal to surrender; and further, though there has been no general discussion, yet if some who make the

surrender make terms on behalf of the others, the others too will be entitled to the benefit of the terms, just as one partner may contract on behalf of another, as Giovio says in another place, since they have a common interest, especially in a necessary matter and one of evident utility; although, if punishment were to be inflicted by the prince for the surrender being made, individuals who voted against it should be excused.

Gentilis, I, 17.

39. *Whether one sent to treat about surrender is bound by terms made during his absence?*

When the Prince of Orange on behalf of the King of Spain besieged Aversa in Italy, which the Marquis of Saluzzo, a general of the King of France, held with a garrison, Guido Rangone was sent by Saluzzo to Orange to negotiate a surrender on the best terms he could. Rangone being detained for a considerable time, and part of the wall having fallen under the perpetual cannonade, Saluzzo, worn out by the prayers of his soldiers and the tears of the people of Aversa, employed another suitable person and made a surrender to Orange at discretion. When Rangone heard of this, he protested that in fairness he was free and that he would not acknowledge terms the benefit of which he did not wish to enjoy. A debate was held before Vasto, another commander of the King of Spain, on the question whether Rangone should by the Law of War be treated as a prisoner; and Vasto, says Giovio, adopted the milder view on the question and set him free.

This view, Gentilis maintains, is also confirmed by law, provided that he was a man who up to that time had been able to protect the town or himself; because although the decision of a majority holds notwithstanding the opposition of a minority, yet a decision made in the absence of one person whose presence might have won over the others to his own view can not stand.

Gentilis, II, 17.

40. *Whether a mistake in the execution of a surrender makes the surrender itself void?*

Valerio Ursino had surrendered to the Spaniards on the condition that he should be conducted in safety to the French camp. The Spaniards afterwards maintained that he should be kept a prisoner, on the pretext that there was no French camp in existence at the time; but out of respect for his bravery, according to Giovio, they released him. Gentilis, however, maintains that justice also required his release, because the substance of the agreement was absolute, that he should not be a prisoner, not conditional on there being a French camp somewhere in existence. The mention of the camp was added to secure the safe performance of

the agreement, because Valerio would be safe in that camp; and words relating merely to performance do not affect the substance. Accordingly when the Ætolians surrendered and made a mistake in the wording of the terms of surrender, the Romans thought it fair that they should be restored to their former position.

Gentilis, II, 17; Giovio, book XXVI.

41. Whether one to whom a surrender is made may punish those who surrender as traitors?

When a garrison took and threw into chains their commandant, who refused to agree to a surrender, and then themselves made terms and surrendered to Solyman, he ordered the commandant to be treated with honor and the garrison to be all put to death. Giovio calls this a cruel butchery carried out at the command of a savage general. Others consider his action not only just but laudable, since the garrison were wrong in breaking the oath of service to their commandant. Still they had been given written guarantees of freedom; so that Solyman broke his own word in punishing the treachery of others. "What is our verdict?" says Gentilis. "Of that treachery the judge was not Solyman, but another. And yet we may say that Solyman, who knew nothing of their treachery when they fled to him in defiance of the commandant's authority, might treat them as deserters"; and he concludes, "This is my opinion."

Giovio, book XXVIII; Gentilis, II, 17.

42. Whether treaties or pledges of peace made by generals bind a prince or people?

Livy records that the Senate refused to ratify the agreement made by Sulpicius, a tribune of soldiers, with the Gauls as to their relinquishing a siege; and Sallust, in regard to the peace between Aulus, the general of the Roman army, and Jugurtha, King of the Numidians, says: "The Senate, as was indeed right, resolved that no treaty could be made without their own and the people's authority." A doubt arises, however, where the supreme authority knew of the matter, and kept silence. In such cases a distinction should be drawn between a pledge made conditionally on its being ratified by the supreme authority, for this condition avoids the pledge, and one made absolutely; and in the latter case if, without anything being said, acts follow which can not reasonably be referred to any other cause, the pledge will rightly be deemed to have been ratified; but if nothing follows except mere silence, there is no ratification. For without some act or thing, silence itself does not raise a sufficiently probable presumption of intention.

Ayala, I, 7, § 5; Gentilis, II, 10; Besold, on Peace, ch. 4, § 1; Grotius, II, 15, §§ 15, 16, etc.

43. *Whether if the pledge of a general is disapproved by the supreme authority, those to whom it was given should be restored to their former position?*

When the Senate was debating the Caudine peace, Spurius Postumius, one of the authors of the peace, on being asked his opinion, said:

"My opinion will be my witness whether I spared myself or the legions when I bound myself by this pledge, be it dishonorable or necessary. Yet, since it was made without their authority, the Roman people are not bound by it; nor is anything due to the Samnites thereby except our persons. Let the Fecials surrender us naked and bound, and let us absolve the people from any obligation we may have put upon them."

Other speakers, Lucius Livius and Quintus Melius, tribunes of the Plebs, argued that the people could not be absolved by the surrender of themselves, unless everything were restored to the Samnites as it had been at Caudium. And this was what Claudius Pontius, King of the Samnites, contended, when he refused to accept the surrender, saying:

"Let the Roman people, if they repent of the pledge given, restore the legions within the pass which hemmed them in; let them receive back the arms which they gave up under the agreement, and return to their camp."

Grotius says that the opinion of the tribunes and of Pontius seems to accord with equity; that of Postumius to have been approved in practice.

Livy, book IX; Grotius, II, 15, § 16.

44. *Whether persons restored to freedom are bound to fulfil the agreements which they make as prisoners?*

Francis, King of France, by the peace of Madrid promised the Emperor Charles on oath that when he reached the territory of his kingdom he would ratify the terms of peace. When, however, he came to the Parliament of Paris, he asked its advice, whereupon Selva, the President of the Parliament, in order to break the peace, using the authority of Cardinal Zabarella and the example of John, King of Cyprus, who did not keep his word given when he was taken prisoner by the Genoese, advised and convinced him that what was done under the influence of force and fear ought not to be held binding. Bodin expresses his surprise that the president of so great a Parliament did not blush to defend this opinion with arguments so foolish; since, in fact, it was inconsistent not only with the judgment of the Romans, Attilius Regulus and the consul Mancinus, but also with that of the French themselves, who allowed King John to return to England, on account of a pledge given to the King of England, when a prisoner, because he could not carry out what he had promised.

Bodin, V, last chapter; Hotman, Famous Questions, 7; Gentilis, II, 11.

45. *Whether when it is agreed in a peace that what each possessed before the war is to be restored to him, the words must be understood to refer to the beginning of the war or its renewal?*

In articles of peace between the Prince of Trent and the Venetians it was provided that each should hold what he held "before the last existing war." After the beginning of the war the Prince had seized a fort; and when the war was renewed after a truce, the fort was recovered by the Venetians. The question was raised whether by the peace the fort belonged to the Venetians. Alciati gave an opinion in favor of the Prince, on the ground that the "last existing war" appears to mean the war renewed after the truce. But Gentilis holds that his opinion was incorrect, because it was the same war, although hostilities were suspended by the truce, and so it was both "last" and "existing"; and he says that a thing renewed is not a new thing, but an old one begun anew.

Gentilis, II, 12; Grotius, III, 20, §§ 13, 21; Feschiuss, on Treaties, Thesis 21, at the end; question between the Emperor and the Venetians on the restoration of places; Azazio, Opinions, II, 13.

46. *Whether when it is agreed that the places which were held in the war shall be held in the peace, villages and hamlets near to towns are included?*

When the French held certain strongly garrisoned places in Piedmont, such as Casale and Turin, which were metropolitan cities, they agreed with the Imperialists and the Savoyards each to hold during a truce what they held during the war. Whereupon the French claimed to have the same right in villages and hamlets as in the towns, on the ground that the places were near to the towns, had been subject to them in the time of the war, and had contributed taxes and services. Pierino Belli said that in acquisition under the Law of Nations, a natural rather than a civil act ought to be considered; hence for possession an actual and complete apprehension is required, nor does the acquisition of a part not entered upon follow from the entry on or acquisition of another part; nor is occupation or transfer of possession acquired by the receipt of payments or taxation, because such acts affect persons rather than places, and acts which are indifferent and indiscriminate do not prove possession; nor is the right of ownership derived from subjects held against their will.

Belli, V, § 7; and authorities by him cited.

47. *Whether when it is agreed in a peace to restore captured places, the restoration of a town which anciently belonged to the kingdom of the captor should be refused?*

By the Treaty of Cateau-Cambresis, Calais, which had been captured by the French in the war with Philip, King of Spain, and Mary,

Queen of England, was to be restored after eight years. When it was not so restored, Thomas Smith was sent into France and formally demanded its return in the presence of the King. The King referred the matter to his councilors; and one of them, the chancellor Michael L'Hôpital, argued in this manner: The English might seek to recover even Paris by the same right as they sought Calais, for they won one as well as the other by war, and by war they lost both. The English pretended a new right to Calais; the right of the French was as old as the Kingdom itself. Although the English held it for two hundred and thirty years, more or less, yet the right to it was in the Kings of France, no less than was the right to the duchies of Aquitaine and Normandy, which the English long held by force of arms. Calais, like those duchies, the French had not acquired, but recovered, by war. Prescription had no place between princes, but right held good, and according to the Twelve Tables its validity against an enemy lasted forever. The English, in the late treaty of Troyes, did not even mention Calais, so that they appeared to acknowledge that they had abandoned their claim to it. There was indeed a clause as to the reservation of existing rights, but that referred only to minor matters; this of Calais must be regarded as of the first importance.

To this Smith replied that he had not expected so obsolete a right to Calais to be hunted up from the depths of antiquity; but now at last he saw that whatever the French had once got into their possession, whether by right or by wrong, they regarded as their own by right, as though in their eyes the only right were in arms, and it made no difference whether they possessed in good faith or bad. The French thought they held Calais by the right of "postliminium," whereas they really held it under agreement, and were resolved on no account to keep their pledged word for the restoration of Calais. In the Treaty of Troyes it had not been claimed because the eight years had not then expired. Here rising and turning to the French councilors he said:

"I appeal to the honor of you who were present when we urged that our right to Calais should be reserved in express terms, and you that it should be omitted because the time had not yet come, whether it was not then agreed between us that it should be reserved under that clause 'all other claims to remain safe and unaffected'?"

Camden, Annals, 1567.

48. *Whether when it is agreed to restore goods or their value,
it is sufficient, when goods which are in existence
are claimed, to offer their value?*

When the companies of English and Dutch merchants trading in the East Indies had inflicted great losses on one another by hostile attacks, it was at length agreed that each side should abstain from causing

injury and loss to the other; and that both ships and goods, or their value, taken from the time of the agreement being entered into down to its publication in those parts, should be restored on either side. In virtue of this agreement the merchants of the English Company claimed the restitution of certain goods which had been taken after the agreement was entered into, and conveyed to Holland. The representatives of the Dutch Company contended that restitution could not be claimed, except in the Indies, where the goods were taken; and not restitution of the goods themselves, but of their value at the time of capture. On the side of the English Company it was replied that when an agreement is for restitution simply, captured goods may be claimed wherever found, because it concerns the debtors, who are under obligation to pay, to specify times and places, otherwise the creditors have the right to exact payment anywhere and at any time. As to the question of value, it was a rule of the common law that goods actually in existence should be restored in specie; and in an agreement which contained no provision to the contrary, the same rule should be observed; since after the making of the agreement the capture of the goods was to be regarded as illegal and the property in them had not passed by any legal title from the original owners.

Digest, VI, 1, 10, 11, and 12; Digest, L, 16.

49. Whether compensation should be paid for goods which have perished by an accident preceded by negligence?

In the same agreement between the companies of English and Dutch merchants it was provided that ships captured by either side should be restored in the condition in which they were found in the possession of the captors, but neither party was to be bound to restore ships which had been lost, unless they were lost while in their service; and that goods which in fact had come into the hands of one side or the other should be subject to restitution. A Dutch ship, laden with a cargo, had been captured by the English and, after being some days in their possession, had been burned with its cargo through the fault or negligence of certain sailors; and the Dutch, under this agreement, claimed to be paid the price or value of the ship and cargo on the ground that the ship, being in the possession of the English, must be regarded as in their service and that a loss due to the fault of the English ought to fall on them, and not on the Dutch.

On the side of the English it was contended that the ship, though in their possession, was not in their service, nor did its loss arise out of service, which must be held to be the meaning of the agreement. Nor should a mere accident, due to the fault or negligence of sailors, be imputed to the company of English merchants, since they used the same care in securing the safety of this ship as of their own, and the same misfortune might have happened if the ship had remained in the possession of the Dutch.

Still less were they liable to restore the value of the goods, because the goods having been burned with the ship never in fact or effectively came into their hands. For, according to the definition of the jurists, a thing is to be deemed to have come into a person's hands "in fact," when he has been made richer thereby.

Digest, L, 17, 11; XVIII, 6, 71; L, 16; V, 3.

50. *Whether those who have promised that a state shall be saved may destroy a city?*

When the Carthaginians, after the Third Punic War, harried the allies of the Romans with war and invited the neighboring peoples to revolt, the Roman Senate discussed the question of destroying Carthage. A report of this having been published abroad, the Carthaginians sent ambassadors to Rome, who pleaded that a city, which had so glorious a history and was a monument of famous Roman victories, should not be destroyed. The consuls informed the ambassadors that if the Carthaginians remained loyal to the Senate and people of Rome and gave three hundred hostages and ships to the Roman people, the Carthaginian State should be saved and its people retain the same rights, privileges, and immunities as they had always previously enjoyed. The ambassadors, on receipt of this answer, returned home rejoicing. Soon afterwards Scipio Africanus the Younger was ordered to start at once with a fleet and to destroy the city with fire and sword. Scipio, according to his instructions, sent his lieutenant Censorinus, who, after receiving the hostages and ships, ordered the whole people to leave the city, giving them leave, however, to take with them whatever they wished and to found another city further away from the harbor. The Carthaginians, dumbfounded at the order of the general, appealed to the honor of the Senate and people of Rome; and the answer was that the Roman people had fulfilled their promise to the ambassadors, but that a state was not contained within the walls of a city.

So, too, Pompey, when he led away two hundred Senators and the better part of the citizens from a city which he had abandoned to Cæsar, said that the commonwealth did not consist in walls. The jurist Modestinus, however, says that if a plough is passed over a state, as it was over Carthage, the state ceases to exist; at any rate it is not the same as the state against whose destruction the ambassadors pleaded, and in the expectation of whose safety the Carthaginians handed over their hostages and ships.

And Gentilis says that although there is a distinction between a city and a state, because the buildings are the city, and the inhabitants are the state, yet any interpretation is perverse and strange which does not accord with the common understanding; nor can a state exist without a city, buildings, and walls, which constitute essential elements in it; and he

adds that in many of their actions in the Third Punic War the Romans can hardly be defended.

Livy, book XLV; Diodorus Siculus, book XLI; Digest, VII, 4, 21; Bodin, I, 6; Gentilis, II, 4; Grotius, II, 16, § 15.

51. *Whether an agreement of peace may be broken under provocation?*

Martius, an ambassador of the Romans, remonstrated with Perseus, King of Macedonia, who had renewed a treaty entered into with his father Philip, for having expelled Abripolis, a friend and ally of the Roman people, from his kingdom. Perseus replied:

"If it is so written in the treaty, that I may not defend myself and my Kingdom even if I am attacked, I must confess that I have broken the treaty in defending myself against Abripolis, the ally of the Roman people. But if the Law of Nations grants the right of repelling force by force, what, pray, ought I to have done when Abripolis devastated the territory of my Kingdom and carried off many free persons, a vast number of slaves, and many thousands of cattle?"

Grotius says: "A treaty of peace allows hostile action to be taken in the event of a new cause arising; and if such a cause can be reasonably alleged, it is better to believe that an injustice has been committed without perfidy, than with it."

And Thucydides says: "Peace is broken not by those who repel force by force, but by those who first resort to force."

Livy, book XLII; Grotius, III, 20, § 28; Gentilis, III, 24.

52. *Whether the giving of hostages releases a man from his sworn word?*

Bodin asserts that Francis, King of France, was released from the obligation of the Treaty of Madrid because he had given his sons as hostages. But hostages, says Ayala, like guarantors and securities, are added as accessory to a principal obligation, in order to make the adversary more secure; and so far are they from destroying the principal obligation that they can not exist without it. And so John, King of France, having been taken prisoner in battle by the English, and released on giving his word to return if certain agreements were not fulfilled, preferred to return to the enemy rather than break his word, though he had himself given his son as a hostage.

Bodin, V, last chapter; Ayala, I, 6, § 5; Gentilis, II, 11, at the end.

53. *Whether a hostage may be detained after the death of him for whom the hostage was given?*

Demetrius, who was a hostage at Rome for his brother Antiochus, on learning of his death came before the Senate and said that he had come as a hostage while his brother was alive, but now that he was dead he

knew not whose hostage he was; it was therefore only fair that he should be released to claim his kingdom, and that, as by the Law of Nations he had yielded to his elder brother, so now a minor should yield to himself as being the elder. When, however, he saw that the Senate did not mean to release him, having silently come to the conclusion that the kingdom would be safer in the hands of a minor than in those of Demetrius, he set out from the city under pretense of hunting, and came to Ostia, where he quietly embarked on a ship with a few companions of his flight.

Gentilis says that by civil laws a surety who has guaranteed that Titius will not do a certain act is released by the death of Titius; but that some persons draw a distinction between the words, "Titius, King of Syria, will not do it," in which case the surety is released by the death of Titius, and the words, "The King of Syria, Titius, will not do it," where the surety is not released; on the ground that in the former case, the words "King of Syria" are added to show who the Titius mentioned is, and in the latter the word "Titius" is added to show who is the present King of Syria. But he does not himself decide whether minute distinctions of this kind in the civil law have any application to questions of the Law of Nations such as the present. He holds, however, that a person is sometimes inserted in an agreement, not to make the agreement a personal one, but to show with whom the agreement is made, as when the matter concerns the successor as well; and conversely, even though a proper name is not used, yet the agreement may be a personal one, as when an arbiter makes an award against a king, upon whose death the agreement to submit to arbitration must be held to have lapsed.

Justin, book XXXIV; Gentilis, II, 19; Grotius, III, 20, § 57.

54. Whether those who have given hostages may receive them if they run away?

When the Romans had given hostages to Porsena, King of Etruria, as sureties for a treaty of peace, one of them, a maiden named Clælia, as it chanced that the camp of the Etruscans had been pitched not far from the bank of the Tiber, slipped through the sentinels leading a company of other maidens, swam the Tiber under the javelins of the enemy, and brought them all safe to their friends at Rome. When this became known to the King, he sent envoys to Rome to demand the hostage Clælia, saying that he cared little for the others, but declaring that if the hostage were not given up he would regard the treaty as broken. He added that if she were so given up, he would send her back unharmed to her friends.

On both sides, says Livy, honor was observed; the Romans returned the pledge of peace, as the treaty required, and the brave Clælia was not only kept safe, but honored by the Etruscan King; for he presented the maid with part of the hostages who had remained, and allowed her to

choose whom she wished. All being produced before her, she chose the children, thinking this choice beseemed a maiden, and that it was meet that the age which was exposed to the greatest harm should be released from the enemy.

Bodin says that it has always been lawful to kill hostages who run away, even though not so expressed in the agreement; and so the Tarentines who attempted to run away were brought back to Rome, beaten with rods, and flung from the Rock.

Gentilis agrees that this is the law, because hostages are not prisoners who have a right to run away; for hostages are given under an agreement, which they have no right to break. Grotius, however, says it is clear that a hostage has no right to run away, if he has given his word, either at first or later, in order to secure easier confinement; otherwise the intention of the state does not appear to have been to bind its citizen not to escape, but to give the enemy power to guard him as they please; and so he says that Clælia's action may be defended.

Gentilis and Grotius, however, both conclude that the state which gave the hostage ought not to receive him back and keep him, any more than one may receive back a thing given in pledge without being guilty of theft; and so Edward the Third, King of England, justly accused the King of France of having illegally received a hostage who ran away.

Livy, book II; Gentilis, II, 19; Grotius, II, 20, § 54.

SECTION X.

Of Questions of Wrong between Belligerents.

Questions of Wrong between Belligerents are those in which it is asked whether the rules of war have been observed in the commencement and prosecution of a war, and also in the execution after a victory won.

1. Whether war may ever be commenced without a declaration?

When Gustavus Adolphus, King of Sweden, invaded Germany with an army, the Emperor Ferdinand the Second sent a letter to him in which he said that he was very much surprised that he had invaded the Roman Empire with such a vast army and had raised such huge contingents without declaring war. To which the King replied that he would not have thought it possible that the past should so soon be forgotten by the Emperor. It was a notorious fact, of which all the world was aware, that the commander of the Emperor's troops, without any declaration of war, had led a fresh and powerful army, under the standards of the Eagles, into Prussia; so that he failed to see on what pretext a declaration of war, which the Emperor had himself forgotten, was required from himself, fighting as he was not on the offensive, but on the defensive; or how he could accuse him of acting against the laws of all nations. Those laws did not require an unjust attack made on a person to be repelled merely by heralds, when nature and the very circumstances allowed every man the use of arms for safety in such a case. Nor yet had he altogether omitted a declaration of war; on the contrary he had been particularly careful that no one should be able to complain that he had been attacked and beaten by surprise. In two letters which he had sent to the Electors, and in a message delivered by one of his Privy Councilors to the Emperor's general, he had expressly stated that if amends were not made for the wrong inflicted on him he would at length, after his most just complaints, have recourse to another method of defending himself and his dignity.

On this question the jurists lay down the following rules: As a citation may sometimes be omitted in a civil case, so in war a declaration may sometimes be omitted for just cause; for instance: (1) when war is undertaken on grounds of necessary defense; (2) when war is made on those who are already regarded as enemies; (3) when arms are taken up against rebels and deserters, because with them the Law of Nations is not observed; thus the Romans did not declare war against the people of

Campania and Fidenæ who were deserters; (4) the Fecials lay down a rule that there is no need to make a renunciation of friendship when property is not restored to ambassadors seeking restitution, nor any other form of satisfaction given.

So, too, in Dio, Cæsar argues in favor of commencing a war against Ariovistus without a decree of the Senate and people; for, he says, wars occur for which men may be prepared, and which are preceded by complaints and declarations; but others arise which can not be made the subjects of discussion, because they are inevitable.

Arlianibæus, Swedish Arms, p. 54; Gentilis, II, 2.

2. *Whether war may be commenced at once after a declaration?*

Pierino Belli frankly confesses that he has nowhere found the number of days fixed for commencing war after a declaration. He says, however, that by natural reason it is fair that some time should intervene in which a belligerent may fortify and prepare himself for defense; otherwise one who declares and commences a war practically at the same moment may be accused of bad faith; although one who has given cause for declaring war against himself ought to show himself prepared, especially if the cause is recent, grave, and inexcusable.

Gentilis states that after a declaration there is usually an interval of three and thirty days before hostilities are begun; and perhaps the mention of three days is derived from an Imperial Constitution recorded in Guido Papa; and he says that Cyrus acted wrongly when he commenced and declared a war against the Armenian King at the same time; and the Romans when they declared and commenced the Third Punic War at the same moment; and so he says that a certain bishop rightly told Chosroes, King of the Persians, that he acted unworthily in giving Justinian no time for deliberation, and compelling him either to agree on a peace or to engage in war immediately on its declaration.

Grotius, however, maintains that by the Law of Nations no interval is required after a declaration, and he does not blame Cyrus or the Romans; though he admits that it may happen that natural reason requires some time to intervene, according to the character of the dispute; for instance, when restitution has been demanded or the punishment of an offender required, and there has been no refusal; for in such cases time ought to be allowed in which the demand may conveniently be complied with.

Belli, II, § 9; Gentilis, II, 1, at the end; Grotius, III, 3, § 13.

3. *Whether fraud may be employed in war?*

When Darius had been long besieging Babylon and was greatly troubled at finding the storming of the city so difficult, Zopyrus caused his nose, lips, and ears to be cut off, and set forth to Babylon under the

guise of a deserter. He showed the people his mutilated body, complaining of the cruelty of Darius, and begged them to allow him, his anger being more recent than theirs, to join them in the war. All knew his nobility and his courage, and none distrusted the good faith of one who offered them the wounds of his body as pledges. Accordingly he was appointed a general by a unanimous vote, and having received a small command, he won victories over the Persians, who time after time took care to retreat before him; until at last, the whole army being intrusted to him, he betrayed it to the King and delivered the city into his hands.

Livy, however, says that those who mutilate their own bodies as Zopyrus did are rather notable than honorable, and that frauds of desertion are devices unworthy of Romans; and Messala was somewhat afraid that the thing was not quite honorable when Menedorus, who was about to betray Pompey's fleet, asked that for a time he might be allowed to harass that of Cæsar.

Polybius, however, asserts that force counts for less in war than opportunity and fraud; and Ammianus says that all successful issues of wars are applauded without distinction between valor and fraud; and the jurists call that a "good" fraud which is contrived against an enemy. Gentilis, after reviewing the authorities on the other side, comes to a conclusion which may appear strange, and says: "In my opinion both those who desert and those who send deserters act justly." Grotius brings under this head the action of those who use the enemy's arms, standards, clothes, or sails; for all these are things which any one may employ at will.

Justin, book I, at the end; Gentilis, II, 2; Grotius, III, 1, § 6 and following sections.

4. Whether falsehood may be used to enemies?

When Themistocles was afraid that after the naval victory of the Athenians, Xerxes might still stay in Greece and involve the Greeks in new difficulties, he pretended friendship and advised Xerxes to hasten to leave Greece before the Greeks cut off his retreat; and although Ventidius recognized the Parthian spies who pretended to be deserters to him, he treated them courteously like friends and allowed himself to be overheard by them to say that he intended to take a certain course, when he was really meditating a different course, in order that they might inform the Parthians of what they had heard as being his plans, and the Parthians might make their preparations accord to the report received, and so be caught unprepared at the point where he had determined to attack them. Both used false speaking or lies; Themistocles lied to the enemy, and Ventidius to others in order to deceive the enemy.

Augustine, however, denies that a lie is ever just, even though an enemy, who may justly be deceived by other means, is deceived by it.

But to the rule about not lying, an exception in the words "except to enemies" is added by Plato, Xenophon, Philo among Jews, Chrysostom among Christians, and practically all the theologians except Augustine; and of this Gentilis and Grotius also approve. They add, however, a proviso that what is said about falsehood is to be referred to assertions, not to promises; for a promise confers a right on him to whom the promise is made, and this holds good even between enemies.

Plutarch, Themistocles; Dio, book 49; Gentilis, II, 5; Grotius, III, 1, §§ 17, 18.

5. *Whether enemies may be destroyed by poison?*

When Perseus arranged with a certain native of Tarentum that he should destroy the Romans by poison, Livy says that he did not wage just war, like a king, but attacked them by the secret crimes of robbers and poisoners. Baldus, however, says that to kill an enemy by poison is lawful, according to the teaching of Vegetius, and that it is permitted to use forbidden weapons for defense, since nothing is culpable in the way of defense. Gentilis doubts the authority of Vegetius and says that if he does record any such opinion he probably does so in treating of unlawful stratagems. And he says that it is manifestly false to say that in defensive war anything is allowed, because a defense ought to be blameless. He quotes to the contrary the authority of Lucius Florus, who, when Aquilius finished the remains of the Asiatic war by putting poison in the wells in order to secure the surrender of certain cities, writes that if his action brought an early victory it certainly brought an infamous one; inasmuch as, in defiance of divine law and ancestral custom, he had stained the hitherto unsullied arms of Rome by the use of foul poisons. He also charges with this crime the Spaniards, who, when besieged in Naples by the French, went out at night and poisoned the enemy's wells; and who, well knowing the disease formerly called Neapolitan, but afterwards French, and how contagious it was, secretly sent prostitutes, and those the most beautiful, out of the city, to infect the French army.

Grotius, however, holds that we must not extend this condemnation to merely fouling waters so as to make them undrinkable, without the use of poison; for we must regard that as the same thing as diverting a river or intercepting the channels of a spring, which is lawful both by natural law and by the consent of nations.

Gentilis, II, 4; Grotius, III, 4, § 15.

6. *Whether an enemy may be killed by sending an assassin against him?*

When Porsena, King of the Etruscans, desiring to restore the Tarquins to Rome, was guarding the approaches to the city, Mucius

Scævola by stealth approached the King in his own camp. There as it chanced that the soldiers were receiving their pay, and a clerk sitting with the King in practically the same dress was busied about his work, and the soldiers thronged about him, Mucius killed the clerk in mistake for the King; and when he was arrested, the blow having missed the royal person, he thrust his hand into a blazing fire, and by a ruse doubled their terror; "This will show you," he said, "what a man he is whose blow you have escaped; there are three hundred of us who have sworn the same oath"; whereupon the King, filled with terror, declared that the Romans should be free.

Of this deed Seneca says that he might have done a luckier deed in that camp but not a braver one. Another Roman pretending in a battle that he was one of Mithridates' soldiers, came close up to the King, as though wishing to say something to him, and wounded him; and Gentilis recites many more instances of the same kind. He does not, however, approve of them, but holds that the complaint of Alexander the Great, about the murder of his father procured by Darius, was just: "Though you have arms, you buy the lives of enemies at a price." And he approves the action of Alexander in avenging by a terrible punishment the treacherous murder of this same Darius.

Grotius has a different opinion about Scævola's action, in which Porsena himself saw nothing but valor. He makes a distinction, however, between those who, in making such attempts, are not bound by any tie of allegiance such as unites subjects to their king, vassals to their lord, or soldiers to him whom they serve; and assassins, whose deed is attended by perfidy, whom, he says, we should regard differently; for not only do they themselves act contrary to the Law of Nations, but also those who use their services.

Gentilis, II, 8; Grotius, III, 4, § 18.

7. *Whether the superstition of enemies may be used to their hurt?*

Philip, King of Macedon, crowned with laurel his soldiers when they were about to fight against the Phocians, because the Phocians had despoiled the temple of Apollo, and so would be terrified at the sight of that god's own leaf. The device succeeded, for they at once turned their backs, were cut down, and gave the King a bloodless victory. In the same way an impregnable town in Epirus is said to have been taken, through a traitor in it sinking a dog in the only well which gave drinking-water, because the soldiers of the garrison were imbued with the Greek superstition and declared that they would rather die at once than die from the contaminated water.

Gentilis says there is no reason why advantage should not be taken of the superstition of enemies. But in cock-fighting, when a cock has

been infected with garlic in order that the smell may make the other cock seem to be beaten from the arena, the umpires usually wring its neck; and by the laws of the duel, which especially look to bravery and honor, it is considered scandalous for a combatant secretly to wear a tunic of mail under his outer garment in order that the blows of his adversary may be rendered idle and vain.

Gentilis, II, 2; Zonaras, vol. II; Scanderbegus, V.

8. *Whether the right of retaliation has a place between enemies?*

When a large Carthaginian fleet was defeated near Sicily, and its commanders, broken in spirit, were discussing proposals to sue for peace, Hamilcar said he dared not go to the consuls lest he should be cast into chains in the same manner as the consul Cornelius Asina had been by themselves. Hanno, however, who read the Roman character more truly, considered that no such fate need be feared and went to confer with them with complete confidence. When he was discussing the ending of the war, a tribune of soldiers said that he deserved to be treated as Cornelius Asina had been; but both the consuls bade the tribune hold his peace and said: "The honor of Rome relieves you of that fear, Hanno." "Famous men they were," says Valerius Maximus, "to have the power to put so mighty an enemy in chains; far more famous to have refused to do so."

Gentilis, however, appears to defend the right of retaliation between enemies as lawful, and says the Romans were right in flogging to death or beheading prisoners because Roman prisoners had been slain by the enemy; and also in handing over the noblest Carthaginian prisoners to the sons of Regulus to butcher and destroy in revenge for their father, who was put to death at Carthage in the most barbarous manner. He also records that Spaniards were shamefully treated, and even hanged, by a Florentine, because Florentines in another place had been ill-treated by Spaniards.

Giovio refers to this and declares that it is not to the point here to say that the prisoners are not the persons who acted with cruelty, and therefore they should not be treated with cruelty; for an army is one body, the enemy are one body, and those who make war on one side are one body. Grotius, on the other hand, says that nature does not allow retaliation except against the actual offenders, nor is it enough that by a kind of fiction you regard the enemy as forming one body; because individuals who did not consent to the wrong should not be punished for the offense of the general body; and in the same way Plutarch accuses the Syracusans for having put to death the wives and children of Hicetas, merely because Hicetas had killed the wife, sister, and son of Dion.

Valerius Maximus, VI, 6; Gentilis, II, 18; Grotius, III, 11, § 16; II, 21, § 18.

9. *Whether those who give trouble to an enemy by a useless defense may be treated without mercy when they surrender?*

Henry the Second, King of France, after the capture of Bouvines, ordered certain too obstinate persons to be hanged, on the ground that they had attempted, in defiance of the rules of warfare, to hold against the royal forces a weak position which they could not possibly defend. And Giovio relates that certain persons who had surrendered at the victor's discretion met a shameful death for having stubbornly tried to hold an unfortified position. A Neapolitan, however, said in answer to Belisarius that no one should regard obstinate zeal as worthy of punishment in any man. Moreover, it must be remembered that a man can not desert his allotted post or leave his station or garrison, without the most certain danger of his life. Gentilis says that soldiers who are obstinate in such circumstances may be excused, but certainly can not be acquitted of all blame, because they were not bound to attempt the impossible; nor need it be considered that a soldier fears ill from his own prince, since the injustice of another ought not to prejudice an enemy.

Gentilis, II, 16; Grotius, III, 4, § 13.

10. *Whether those who, while treating of surrender, prepare fortifications and engage in hostilities in the interval, may be treated with greater severity?*

When Ferdinand recovered Reggio by force, all the French were hurled from the walls, because, in order to complete the fortifications which they had begun, they had made pretended overtures for surrender and had fooled the King for a long time by frequent conferences, and had even killed some of his men before the walls with artillery. Gentilis says that those who have entirely concluded an agreement for surrender and not carried it out may sometimes be deservedly treated without mercy, as when the garrison of Perpignan had agreed to surrender the place to the French King within three days, and then appealed for aid to their own side who were bringing relief, and the King hearing of it and perceiving that the request for three days was a mere trick, made a violent attack on the town, stormed it, and put to the sword both women and children. But as in this case there was no actual agreement about surrender, Ferdinand, he says, had no right to punish the French as he did, since mere overtures have no binding force; nor is there anything to forbid a man making a pretense and using deceit to serve his own cause. Some allowance might be made for the killing of the soldiers unawares, but even this ought not to excuse Ferdinand. For what were they doing by the walls? If there was no perfidy, there was no excuse for the use of cruelty.

Gentilis, II, 13.

11. Whether a faithless and fickle enemy who surrenders may be treated with greater severity?

When the inhabitants of Capsa had surrendered to Marius, Sallust relates that their town was burned, the grown men killed, the other inhabitants sold, and the loot divided among the soldiers. This crime against the law of war, he says, was not committed from greed or guilt on the part of the consul, but because the place was a convenient one for Jugurtha, and difficult of access to the Romans; and its inhabitants were a fickle and faithless people, restrained in the past neither by favor nor fear.

Gentilis says the act was contrary to the ordinary laws of war, but may be justified as an exceptional and extraordinary case. In the same way, he says, Cæsar did not spare either the Numidians or Juba when they surrendered, and on some occasions treated the Gauls without mercy, in order to burn the mark of a terrible example into a race fickle in all its counsels.

Gentilis, II, 18.

12. Whether prisoners who can not be guarded may be put to death?

In that famous battle fought at Agincourt under the command of King Henry the Fifth, in which the English overthrew the French power, the victors being outnumbered by their own prisoners, and fearing a nocturnal attack, chose out those of noble rank and butchered the rest. History calls this an inhuman act; nor was the battle so bloody as the victory.

Gentilis says he can not approve. He commends the Scots, however, who although threatened by the gravest danger, did not kill their prisoners; and the French general who, in order to relieve his camp of a multitude of prisoners, generously released them all. He asks, however, whether there may not be exceptional reasons for which prisoners may be put to death, and mentions that Hannibal, when surrounded by Fabius, in order to guard against a rising of the prisoners at a moment of danger, killed them all to the number of five thousand; and that Brutus slew his prisoners when he was about to advance into battle, because he could neither trust nor guard them.

Gentilis, II, 16.

13. Whether those who are twice captured should be spared?

Ligarius, taken prisoner by Cæsar, in order to secure his release, gave his word that he would in future take no action against him; but having failed to keep it and having fallen a second time into Cæsar's hands, he was put to death for ingratitude and perfidy. Cæsar also put to death many others whom he had taken prisoners a second time, accounting it folly to save those who opposed him more than once. How-

ever, says Gentilis, this practice applies chiefly to mercenaries; for there is no reason that a citizen should be treated with special severity, even if he is taken a prisoner a thousand times; for no one can be bound not to defend his country or not to obey his prince.

Gentilis, II, 18.

14. [13] *Whether hostages may be killed for the fault of those by whom they were given?*

The Thracians once put to death two hundred and fifty hostages, and the Romans three hundred Volsci and Aurunci; but Narses, a good general, thought it monstrous to punish innocent hostages; and Scipio said his wrath should fall not on innocent hostages, but on the actual defaulters, and he would exact satisfaction not from an unarmed but from an armed enemy. If, however, the man who has come as a hostage is, or was before, among the delinquents, or if, after giving his word, he has broken it in a great matter, it may be that to punish him is not a wrong. This is the view of Grotius.

Gentilis, however, says that even if they have been guilty of no offense, it is both just and expedient that hostages should be punished; for so honor, the most precious thing in the world, is vindicated, and the Law of War scrupulously kept; his argument being that the punishment arises from agreement, and is therefore as just as if it arose from actual fault or offense. Grotius says that it was so held only when it was commonly believed that a man had the same right over his own life as over other things, and that that right had passed by consent, tacit or express, to the state. But when it came to be recognized that the ownership of life was reserved to God, it was believed that no one could by compact or agreement give another a right over the life either of himself or of his fellow-citizen.

Gentilis, II, 19; Grotius, III, 4, § 14; II, § 18.

15. *Whether women and children conquered in war may be dealt with without mercy?*

Thucydides relates that the Thracians, after the capture of Mycalessus, killed even the women and children; Arrian tells of the same conduct by the Macedonians when they captured Thebes; and Germanicus Cæsar, as Tacitus records, spared neither sex nor age when he wasted the villages of the Marsi, who were a people of Germany.

Grypus, however, in Justin, says that none of his ancestors in all their wars, domestic and foreign, ever dealt cruelly after a victory with women, whose very sex exempts them both from the dangers of war and from the cruelty of conquerors. The examples to the contrary are referred either to the avenging of a serious disaster to the victor's own side, or the punishing of serious offenses.

Gentilis, II, 21; Grotius, III, 4, § 9; 10, § 10.

16. Whether armed women who do the work of men should be spared?

The Emperor Aurelian killed many women whom he took fighting in the dress of men, and led others in his triumphal procession. Gentilis says that no mercy should be shown to Amazons, such as were Artemisia, Zenobia, and Victoria, who was called the "mother of the camp," nor to those furies who met Suetonius Paulinus in the Isle of Man, any more than to a man. But the Spartans refrained from attacking Argos, because there were women in the defense, whom they thought it shameful to injure.

Gentilis gives it as his opinion that in so far as they play the part of men, they are not women; otherwise it would be an easy matter to protect any position against enemies by placing women as its guardians and defenders; and he says the real reason why the Spartans refrained from the attack was that it would have been shameful to be driven back by women, which was what they feared.

Gentilis, II, 21.

17. Whether rape may be committed on women conquered in war?

After the capture of Thebes by Alexander a certain Thracian general ravished Timoclea, a noble Theban lady; and when afterwards he demanded money of her, she led him apart to a well in which she had told him that the more precious of her possessions were concealed, and as he leaned over the mouth of the well to look, pushed him down, and crushed him by throwing stones on the top of him. Brought to Alexander in chains for this crime, he asked her who she was; to which she replied fearlessly, "I am the sister of Theagenes, who was chosen general against Philip, and fell fighting bravely for the liberty of Greece." The King, admiring her nobility and steadfastness, released her with her sons, thinking perhaps, too, that the general had deserved his fate. Certainly Marcellus seems to have disapproved of the rape of women, for it is said that before capturing Syracuse he took measures to prevent their honor being violated; and Ælian after relating that the victorious Sicyonians violated the women and girls of Pellene exclaims, "By the Gods of Greece this is a cruel thing to do, and, as far as I remember, it is condemned even by barbarians."

And "although there are many examples to the contrary, it is absurd," says Gentilis, speaking of Bodin, "to ascribe to the justice of war the unjust acts which are committed in war"; nor does he in this case allow retaliation.

Grotius, however, says, "Some have allowed the rape of women, regarding it only as an injury to an enemy's person, to which they thought it not improper that everything belonging to the enemy should be exposed. Others have not allowed an act of unbridled lust which

ought no more to be unpunished in war than in peace; and this," he says, "is the Law of Nations, not of all nations, but of the better among them."

Curtius, book II; Gentilis, II, 21; Grotius, III, 4, § 19.

18. Whether priests taken in war may be treated with greater severity?

Richard the First, King of England, put Philip, Bishop of Beauvais, whom he took prisoner in war, into prison and chains. The Bishop wrote and complained bitterly of this treatment to the Roman Pope, and the Pope in a letter to the King earnestly begged him not to detain longer his dear son, a sacred person and a shepherd of the Lord's flock. Whereupon the King sent an ambassador to the Pope, and bade him show the Pope the arms in which the Bishop had been taken, and address him in the words of the sons of Jacob to their father, asking for their absent brother: "This have we found; know now whether it be thy son's coat or no." To which the Pope replied: "This is indeed not the coat of my son, nor of my brother, but of some child of Mars; and for aught I care, let him appeal to Mars, if he will, to intercede for his freedom."

Plutarch, however, relates that the Cretans, when involved in civil wars, refrained from all injury to priests; and the Goths are praised by Procopius for sparing the priests of St. Peter and St. Paul without the City. Gentilis, however, says that the rule which he gave for women should also be observed in the case of priests, namely, that if they bear arms they need not be spared. Nor does he hold them exempt from the hazards of war, even if they do not bear arms, if they engage in expeditions and hostile operations and excite and encourage their soldiers against the enemy by harangues or words. In support of this he quotes Æsop's fable about the trumpeter who marched with an army, and on its defeat, falling into the hands of the enemy, begged them not lightly and unjustly to kill him, because he had killed none of them and had not even fought, and carried nothing but a trumpet; to which the enemy replied that that was all the more reason why he should die, because though he could not fight himself, he roused others to the fight. Nevertheless, says Gentilis, such servants of war should be treated somewhat leniently.

Camden, Remains; Gentilis, II, 22; Grotius, III, 10, § 10.

19. Whether things sacred and religious may be violated in war?

When Titus was besieging Jerusalem, he consulted his principal generals as to the fate of the Temple. Some of them were in favor of exercising the right of war and sparing nothing; others thought that he should abstain from violating the Temple unless the Jews fought from it, in which case it should be considered not as a Temple but as a fort.

Titus, however, although the Jews occupied the Temple and defended themselves there, declared that he would not take vengeance on inanimate things instead of men and would not burn so mighty a monument, the destruction of which would be a loss, the preservation an ornament to the Romans. And the fact that it was afterwards burned was due to the obstinacy of the priests and the Jews, who refused to leave it, and to the fury of the soldiers whom Titus was unable to restrain.

The jurist Pomponius says that all places when captured by an enemy cease to be sacred, and he also says "the tombs of enemies are not objects of religion to us, and therefore we may remove the stones from them and turn them to any use we please."

Thucydides, however, says that it was law among the Greeks that any who made a hostile attack should abstain from the sacred places; and Livy says that when Alba was destroyed by the Romans the temples of the Gods were spared. Gentilis approves of not sparing even temples in certain cases, namely: (1) if they are converted to warlike uses; and so, when the Genoese occupied and fortified a temple at Acre, the Venetians did not spare a fane which the enemy had already profaned; (2) when like is paid for like; and so if the Greeks set fire to the temple of Cybele at the burning of Sardis, then the Persians were justified on this ground in afterwards burning temples in Greece. Grotius, however, defines the position by saying that although the mere Law of Nations does not except sacred things and allows religious places to be violated with impunity, yet they can not be violated without contempt of Religion, and the highest reason of all is that which regards Religion.

Zonaras; Gentilis, II, 22; Grotius, III, 5, §§ 2, 3; 12, § 6.

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